

Douglas R. Young (State Bar No. 073248)  
Roderick M. Thompson (State Bar No. 96192)  
Jessica K. Nall (State Bar No. 215149)  
Andrew W. Ingersoll (State Bar No. 221348)  
Farella Braun & Martel LLP  
235 Montgomery Street, 17th Floor  
San Francisco, CA 94104  
Telephone: (415) 954-4400  
Facsimile: (415) 954-4480  
[dyoung@fbm.com](mailto:dyoung@fbm.com)  
[rthompson@fbm.com](mailto:rthompson@fbm.com)  
[jnall@fbm.com](mailto:jnall@fbm.com)  
[aingersoll@fbm.com](mailto:aingersoll@fbm.com)

Attorneys for Defendant  
RANDALL WULFF

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

MANI SUBRAMANIAN, as an individual  
and citizen of Washington, and as a derivative  
action plaintiff,

Plaintiff,

vs.

ST. PAUL FIRE AND MARINE  
INSURANCE COMPANY, a Minnesota  
Corporation, and QAD INC., a Delaware  
Corporation with principal place of business  
in California, and ARTHUR ANDERSEN  
LLP, a limited liability partnership  
headquartered in Chicago, Illinois, and  
ANDERSEN WORLDWIDE SC, a Societe  
Cooperative headquartered in Geneva,  
Switzerland, and JOHN DOORDAN, an  
individual and citizen of California, and  
LAIFOON LEE, an individual and Citizen of  
California, and ROLAND DESILETS, an  
individual and citizen of New Jersey, and  
WILLIAM D. CONNELL, an individual an  
citizen of California, and GREENAN  
PFEFFER, SALLANDER and LALLY LLP,  
a limited liability partnership headquartered  
in California, and RANDALL WULFF, an  
individual and citizen of California, and  
DOES 1-50,

Defendants.

Case No. 08-cv-1426-VRW

**REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF DEFENDANT RANDALL  
WULFF'S MOTIONS TO DISMISS OR, IN  
THE ALTERNATIVE, FOR SUMMARY  
JUDGMENT AND/OR TO STRIKE  
COMPLAINT**

Date: October 9, 2008  
Time: 2:30 p.m.  
Dept: Courtroom 6  
Judge: Hon. Vaughn R. Walker

Pursuant to Federal Rule of Evidence 201, Defendant Randall Wulff ("Mr. Wulff") respectfully requests that the Court, in considering Mr. Wulff's Motion to Dismiss the First Amended Complaint, take judicial notice of the following documents:

- A. Dismissal Order in the matter *Vedatech, Inc., Vedatech KK, Mani Subramanian v. St. Paul Fire & Marine Insurance Co., QAD Inc, QAD Japan KK, Randall Wulff*, Nos. 04-1249, 04-1813, 04-1403 (U.S.D.C., Northern Dist.), dated June 22, 2005, a true and correct copy of the which is attached as Exhibit A.
- B. Order affirming the District Court order in the matter *St. Paul Fire & Marine Insurance Company and United States Fidelity and Guaranty Company v. Vedatech International, Inc. et al.*, No. 05-16255 (9<sup>th</sup> Cir.), dated July 19, 2007, a true and correct copy of the which is attached as Exhibit B.
- C. Plaintiff's First Amended Complaint in *Vedatech Inc., Vedatech K.K., Subramanian v. St. Paul Fire & Marine Insurance Company, United States Fidelity and Guaranty Company, QAD Inc., QAD Japan K.K. and Randall Wulff*, No. C-04-01249 (U.S.D.C., Northern Dist.), dated June 15, 2004, including Exhibit A thereto, a true and correct copy of the which is attached as Exhibit C.
- D. Stipulation and Order regarding Mediation in the matter *St. Paul Fire & Marine Insurance Company v. Vedatech International, Inc.*, No. CV-771638 (Cal Super. Ct., Santa Clara County), dated March 4, 2004, a true and correct copy of the which is attached as Exhibit D.
- E. Decree of Judgment in the matters *St. Paul Fire & Marine Insurance Company et al. v. Vedatech International Inc.*, et al., No. 05-16255 and No. 05-16261 (9<sup>th</sup> Cir.) and *Vedatech, Inc. v. St. Paul Fire & Marine Insurance*, No. 05-16405, dated July 19, 2007, a true and correct copy of the which is attached as Exhibit E.

1 Pursuant to Fed. R. Evid. 201, the Court can take judicial notice of the contents of court  
2 files such as exhibits A-E hereto. *See, e.g., Burbank Glendale Pasadena Airport Auth. v. City of*  
3 *Burbank*, 136 F.3d 1360, 1364 (9<sup>th</sup> Cir. 1998).

4 Dated: August 4, 2008

FARELLA BRAUN & MARTEL LLP

6 By: /s/  
7 Andrew W. Ingersoll

8 Attorneys for Defendant  
9 RANDALL WULFF  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VEDATECH, INC, VEDATECH KK, MANI  
SUBRAMANIAN (an individual),

No C 04-1249 VRW  
04-1818 VRW  
04-1403 VRW

Plaintiffs,

ORDER

v

ST PAUL FIRE & MARINE INSURANCE  
CO, QAD INC, QAD JAPAN KK,  
RANDALL WULFF (an individual),

Defendants.

Mani Subramanian (Subramanian) owns Vedatech, Inc and Vedatech KK (collectively "Vedatech") and appears in the cases at bar in *propria persona*. Subramanian and Vedatech have brought suit against defendant QAD Inc (QAD) which moves in No 04-1249 to dismiss Subramanian's and Vedatech's first amended complaint (FAC) pursuant to FRCP 12(b)(6) and 41(e). Doc #44. Next, defendant QAD Japan K K (QADKK) also moves in 04-1249 to dismiss the FAC pursuant to FRCP 12(b)(5) and (b)(6). Id. Defendant Randall Wulff (Wulff)

1 moves in 04-1249 the court to dismiss the FAC pursuant to FRCP  
2 12(b)(6) and 41(e). Doc #52. Next, defendant St Paul Fire &  
3 Marine Insurance Company (St Paul) moves in 04-1249 to dismiss the  
4 FAC pursuant to FRCP 12(b)(6). Doc #45. Additionally, all  
5 defendants seek sanctions pursuant to FRCP 11 or 28 USC § 1927.  
6 (04-1249 Docs ##86, 97, 106). Subramanian and Vedatech seek  
7 sanctions pursuant to FRCP 11 against Wulff. (04-1249 Doc #61).  
8 Finally, St Paul seeks to remand Nos 04-1403 and 04-1818 to Santa  
9 Clara superior court. (C-04-1818 Docs ##7, 19) (C-04-1403 Docs  
10 ##11, 40).

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12 I

13 A

14 *The First Action*

15 On January 26, 1998, QAD and QADKK filed suit against  
16 plaintiffs Vedatech Inc and Vedatech KK (collectively "Vedatech")  
17 and Mani Subramanian ("Subramanian"), owner of all Vedatech  
18 entities, in the Santa Clara superior court (hereinafter, the  
19 "first action"). The first action arose out of contractual and  
20 tort disputes between QAD, QADKK, Vedatech and Subramanian  
21 regarding QAD's hiring (and firing) of Vedatech and Subramanian to  
22 develop computer software in Japan. The substance of the  
23 allegations in the first action need not be recited in depth.  
24 Suffice it to say, QAD's and QADKK's allegations were premised  
25 entirely on state law.

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27 B

28 *The Second Action*

1 In September 1999, Vedatech and Subramanian filed their  
2 own action in the Santa Clara superior court against QAD, QADKK,  
3 Arthur Anderson LLP, Foon Lee and John Doordan alleging fourteen  
4 causes of action including, but not limited to, breach of contract,  
5 fraud, constructive fraud, negligent misrepresentation, trade libel  
6 and state unfair competition (hereinafter, the "second action").  
7 Like the first action, all claims in the second action were  
8 premised entirely on state law. In the second action, Vedatech and  
9 Subramanian alleged that these defendants conspired to sabotage  
10 (and did sabotage) Vedatech and Subramanian's contractual  
11 performance of developing software for QAD and QADKK in Japan. QAD  
12 and QADKK filed a counterclaim in the second action essentially  
13 duplicating their affirmative allegations in the first action. The  
14 first and second actions were consolidated in late 2001 and  
15 assigned to Judge Jack Komar (hereinafter, the "consolidated  
16 action").

## C

*The Third Action*

20 Between 1997 and 2000, St Paul issued Vedatech various  
21 policies of comprehensive general liability insurance.  
22 Accordingly, on January 14, 1999, Vedatech and Subramanian tendered  
23 to St Paul the defense of Vedatech and Subramanian in the first  
24 action. St Paul agreed, under a reservation of rights, to provide  
25 a defense for Vedatech and Subramanian in the first action (where  
26 they were defendants) on May 5, 1999. Moreover, the language of  
27 the insurance policy stated, in pertinent part, that "St Paul may,  
28 at [its] discretion, investigate any 'occurrence' and settle any

1 claim or suit that may result." St Paul explicitly declined to  
2 defend Vedatech and Subramanian regarding the cross-claims filed by  
3 QAD and QADKK in the second action.

4 After almost five years of defending Vedatech and  
5 Subramanian in the first action, it became clear to St Paul that  
6 the events giving rise to the first action occurred entirely in  
7 Japan. St Paul's insurance policy with Vedatech and Subramanian,  
8 however, provided only domestic coverage. Unsurprisingly, a  
9 dispute arose between Vedatech and Subramanian and St Paul  
10 regarding liability coverage and indemnity issues under the  
11 insurance agreement. Based upon these disputes, on February 8,  
12 2002, St Paul filed an action for declaratory relief (hereinafter,  
13 the "third action") in the Santa Clara superior court against  
14 Vedatech and Subramanian seeking a judicial determination regarding  
15 the scope of St Paul's duty to defend and indemnify Vedatech and  
16 Subramanian in the entire consolidated action. Vedatech and  
17 Subramanian then began asserting that St Paul's duty to defend  
18 extended to the second action as well.

19 Not to be outdone, Vedatech and Subramanian filed a  
20 counterclaim against St Paul alleging a pattern of unfair  
21 competition in denying benefits, breach of contract and bad faith.  
22 Also in the counterclaim, Vedatech and Subramanian asserted, for  
23 the first time, that St Paul had a duty to fund the prosecution of  
24 Vedatech and Subramanian's affirmative claims in the second action.  
25 On June 26, 2002, Subramanian individually removed the third action  
26 to this court on the basis of diversity jurisdiction. On October  
27 21, 2002, however, Judge Fogel remanded the third action pursuant  
28 to 28 USC § 1446 because Vedatech had not joined Subramanian in the

1 petition for removal. See C-02-3061, Doc #31 (Remand Order). This  
2 brief stint in Judge Fogel's court was only the first time, but far  
3 from the last, that these parties would darken this court's doors.

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5 D

6 *Court-Ordered Mediation of Consolidated Action*

7 In the meantime, Judge Komar set the consolidated action  
8 for trial on May 3, 2004, in state court. While Subramanian  
9 appeared *pro se*, Vedatech was represented at all times by counsel,  
10 namely Christina Gonzaga (Gonzaga) of the Law Office of James S  
11 Knopf. On January 13, 2004, Judge Komar verbally ordered all  
12 parties to the consolidated action (including St Paul as Vedatech's  
13 insurer) to attend mediation before Wulff, a private mediator. C  
14 04-1249 VRW, Doc #87, Ex F at 17:13-14 (transcript) (Judge Komar  
15 stated: "Right now, I'm ordering you [Vedatech and Subramanian] to  
16 go to mediation") (emphasis added). Judge Komar chose Wulff based  
17 upon St Paul's representation that Wulff was a very skilled  
18 mediator whom St Paul had previously worked with on other mediation  
19 proceedings. On March 4, 2004, Judge Komar, in writing, ordered  
20 all parties to attend the Wulff mediation on March 12, 2004. Id,  
21 Ex H (Med Order).

22 On March 12, 2004, the mediation was held before Wulff  
23 with all parties attending. At the mediation, all parties were  
24 required to sign a confidentiality agreement that provided, in  
25 pertinent part, that "all parties agree that the mediator \* \* \*  
26 ha[s] no liability for any act or omission in connection with the  
27 mediation." Doc #54, Ex A (Conf Agreement). Subramanian signed  
28 the confidentiality agreement on his own behalf and Gonzaga (as



1 well as James Knopp) signed the agreement on behalf of Vedatech.  
2 Id. Although Subramanian altered the wording of portions of the  
3 document, those changes did not alter the relevant language quoted  
4 above.

5 The mediation commenced at 9:30 am and continued until  
6 4:00 pm when Subramanian and Vedatech's attorneys abruptly left the  
7 mediation. But St Paul (as Vedatech's insurer), QAD and QADKK  
8 elected to continue the mediation and eventually reached a  
9 settlement of the consolidated action (the "settlement agreement").  
10 Under this agreement, QAD and QADKK agreed to release and dismiss,  
11 with prejudice, the entire first action (as well as all  
12 counterclaims asserted by QAD and QADKK in the second action). Doc  
13 #46, Ex A (Sett Agreement). In consideration of this dismissal, St  
14 Paul agreed to pay QAD and QADKK the sum of \$500,000. Id at 3.  
15 This agreement was signed and executed by QAD, QADKK and St Paul on  
16 March 25, 2004. Id at 6-7. Moreover, the settlement agreement  
17 specifically provided that Vedatech and Subramanian could continue  
18 to litigate their affirmative claims against QAD and QADKK in the  
19 second action. Id. Whether St Paul was contractually obligated to  
20 fund such prosecution was, of course, a hotly contested issue in  
21 the third action.

22 E

23 *The Fourth Action*

24 To say that Vedatech and Subramanian were unhappy with  
25 the settlement agreement would be an understatement. Specifically,  
26 they were unhappy with the settlement agreement to the extent it  
27 apparently relieved St Paul from its duty (a duty St Paul  
28 vigorously disputes in the third action) of having to prosecute

1 Vedatech's and Subramanian's affirmative claims in the second  
2 action. Vedatech and Subramanian turned their anger into action  
3 and on March 30, 2004, they filed a lawsuit, in federal court,  
4 alleging seven causes of action against St Paul, QAD, QADKK, Wulff  
5 and 50 "Doe" defendants (hereinafter, the "fourth action"). This  
6 action, based on diversity jurisdiction, was assigned to the  
7 undersigned. C 04-1249 VRW Doc #1. Vedatech and Subramanian filed  
8 their first amended complaint on June 15, 2004. Doc #36 (FAC).  
9 The FAC is currently the operative complaint in the fourth action.

10         The seven "causes of action" pled in the FAC include: (1)  
11 declaratory judgment, (2) injunctive relief, (3) fraud,  
12 (4) constructive fraud, (5) negligent misrepresentation, (6)  
13 insurance bad faith and (7) unfair competition. The sum and  
14 substance of Vedatech and Subramanian's 49-page (sometimes  
15 unintelligible) FAC appears to be that St Paul, QAD, QADKK, Wulff  
16 and 50 unknown defendants covertly conspired and colluded to get  
17 Vedatech and Subramanian to "consent" to mediate the consolidated  
18 action. Doc #36 at 19 (stating that Vedatech and Subramanian were  
19 "tricked into 'consenting' to mediation before Wulff"). Once this  
20 fraudulent plan came to fruition and the mediation took place, the  
21 defendants further conspired in an effort to settle the  
22 consolidated action on terms that were not in Vedatech and  
23 Subramanian's best interests. Id at 9 (stating that St Paul  
24 "formulated a strategy for using the secrecy of mediation as a  
25 cover for engaging in collusive and bad faith negotiations with QAD  
26 \* \* \* and Wulff"). As discussed above, the settlement agreement  
27 was not "favorable," according to Vedatech and Subramanian, because  
28 it "weaken[ed] Vedatech's [and Subramanian's] legal representation

1 for the affirmative claims" involved in the second action. Id at  
2 19. The FAC was signed by Subramanian, on his own behalf, and  
3 Gonzaga, as counsel for Vedatech. All defendants, save the unknown  
4 "Doe" defendants, have separately moved for dismissal of the FAC on  
5 various grounds. These dispositive motions are currently before  
6 the court.

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8 F

9 *The Removal Rampage*

10 Vedatech and Subramanian's anger did not end with the  
11 filing of the fourth action in federal court: The settlement  
12 agreement sent Vedatech and Subramanian on what can only be  
13 described as a removal rampage. As described in depth below, from  
14 March 15, 2004, to May 6, 2004, Vedatech and Subramanian filed four  
15 petitions for removal in this court; two petitions involved the  
16 consolidated action (the action subject to the settlement  
17 agreement) and two petitions involved the third action.

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20 *Removal #1*

21 On March 15, 2004, before St Paul and QAD had finalized  
22 the settlement agreement, Vedatech and Subramanian removed the  
23 consolidated action to this court. The removal petition was  
24 assigned to Judge Hamilton. C-04-1035 PJH. Vedatech and  
25 Subramanian purportedly removed the consolidated action pursuant to  
26 28 USC § 1446(b), asserting that federal question jurisdiction had  
27 arisen on March 10, 2004. In support of the removal, they offered  
28 an interrogatory response from QAD and QADKK in which QAD claimed

1 that it reserved all of its rights, including copyrights, in the  
2 software that Vedatech and Subramanian had created in Japan.  
3 According to Vedatech and Subramanian, this interrogatory response  
4 revealed that the basis for QAD's state law claims in the  
5 consolidated action was, in actuality, the Copyright Act, 17 USC  
6 §§ 101 et seq. Since the consolidated action, according to  
7 Vedatech and Subramanian, would now require an interpretation of  
8 the federal Copyright Act, the consolidated action was removable  
9 pursuant to 28 USC § 1446(b).

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12 *Removal #2*

13 Additionally, on April 12, 2004, Vedatech and Subramanian  
14 removed the third action to this court pursuant to 28 USC §  
15 1446(b). This removal petition, which contained nine exhibits and  
16 totaled hundreds of pages, was assigned to Judge Conti. C 04-1403  
17 SC. Vedatech and Subramanian's "removal logic" goes as follows:  
18 For St Paul to prevail in the third action (the insurance  
19 declaratory relief action), St Paul would be required to "litigate  
20 the issues in the underlying cases [i e, consolidated action],"  
21 which, as asserted by Vedatech and Subramanian, were now removable  
22 pursuant to 28 USC § 1446(b). Thus, according to Vedatech and  
23 Subramanian, because the consolidated action now raised a federal  
24 question (i e, application of the Copyright Act) and because St  
25 Paul would necessarily have to litigate this federal question to  
26 prevail in the third action, the third action itself was now  
27 removable.

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*Remand #1*

On April 29, 2004, Judge Hamilton remanded the consolidated action finding: (1) the consolidated action raised no federal question and thus the court lacked subject matter jurisdiction and (2) even if subject matter jurisdiction existed, the removal was untimely. C 04-1035, Doc #43 (Remand Order). Vedatech and Subramanian appealed Judge Hamilton's April 29, 2004, remand order to the United States Court of Appeals for the Ninth Circuit. C-04-1305, Doc #48 (Not App). On August 16, 2004, the Ninth Circuit dismissed Vedatech and Subramanian's appeal pursuant to 28 USC § 1447(d).

4

*Removal #3 and Remand #2*

Not content to wait for the Ninth Circuit, Vedatech and Subramanian on May 6, 2004, filed a new petition for removal of the consolidated action pursuant to 28 USC § 1446(b). This new petition was 63 pages long and contained 146 paragraphs purporting to demonstrate that Judge Hamilton had clearly erred in remanding the consolidated action and again argued that federal jurisdiction existed in the consolidated case pursuant to 28 USC § 1446(b). The new removal petition was assigned to Judge Ware. Judge Hamilton, however, intervened on May 26, 2004, and related the second removal petition to the first petition. C-04-1806 PJH, Doc #15 (Related Case Order). QAD and QADKK filed yet another motion to remand, Doc #16, and Vedatech and Subramanian immediately sought to have Judge Hamilton recused from adjudicating the motion to remand. Judge

1 Hamilton denied the recusal motion and again heard oral arguments  
2 on the motion to remand the consolidated case. On July 16, 2004,  
3 Judge Hamilton remanded the consolidated action for the second  
4 time. In her order, Judge Hamilton stated: "As was true when this  
5 same action was [first] removed \* \* \*, the present notice of  
6 removal does not establish the existence of a federal question."  
7 Doc #45 (Remand Order). Moreover, Judge Hamilton stated that  
8 "should the removing parties remove this action yet another time,  
9 the court will invite the QAD parties \* \* \* to file a motion for  
10 sanctions under [FRCP] 11." Id.

11 Vedatech and Subramanian appealed Judge Hamilton's second  
12 remand of the consolidated case to the Ninth Circuit. Doc #47.  
13 The Ninth Circuit, however, dismissed this appeal on August 16,  
14 2004, citing 28 USC § 1447(d). Astonishingly, on August 30, 2004,  
15 Vedatech and Subramanian filed a petition for rehearing en banc of  
16 the Ninth Circuit's August 16, 2004, order dismissing their appeal  
17 of both of Judge Hamilton's remand orders. On February 16, 2005,  
18 the petition for rehearing en banc was denied and on February 23,  
19 2005, Vedatech and Subramanian filed a motion to stay the Ninth  
20 Circuit's mandate. As of the date of this order, the motion to  
21 stay is still pending before the Ninth Circuit. The court will not  
22 speculate whether Vedatech and Subramanian intend to petition the  
23 Ninth Circuit's order to the United States Supreme Court for  
24 certiorari.

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27 *Removal #4*

28 Falling further down the rabbit hole, on May 7, 2004,

1 Vedatech and Subramanian filed a second petition for removal in the  
2 third action, which, as described above, had already been removed  
3 and assigned to Judge Conti for remand determination. C-04-1403  
4 SC. What is more, Judge Conti had not yet remanded the third  
5 action to state court; St Paul's motion to remand was still pending  
6 before Judge Conti. The second petition for removal of the third  
7 action was assigned to Judge Fogel. C-04-1818 JF. The second  
8 petition for removal of the third action was signed by Subramanian  
9 and Gonzaga.

10  
11 E

12 *Present Status of Litigation*

13 In an attempt to corral this removal beast, on July 2,  
14 2004, the undersigned related the fourth action (04-1249 VRW) and  
15 both of Vedatech and Subramanian's petitions for removal of the  
16 third action (04-1403 VRW and 04-1818 VRW). The court has received  
17 St Paul's motion to remand, Vedatech and Subramanian's opposition  
18 and St Paul's reply. C-04-1403, Docs ##11, 25, 30. Accordingly,  
19 the issue whether to remand the third action has been fully  
20 briefed, is currently before the court and is ripe for  
21 adjudication.

22 In the meantime, Vedatech and Subramanian filed a motion  
23 to impose sanctions pursuant to Rule 11 against Wulff in the fourth  
24 action. Doc #61. Wulff opposes this motion. Doc #63. This  
25 motion is also before the court.

26 On September 16, 2004, the court heard oral arguments  
27 regarding (1) the three motions to dismiss the FAC, (2) St Paul's  
28

1 motion to remand the third action and (3) Vedatech and  
2 Subramanian's motion for Rule 11 sanctions against Wulff. Doc #83.  
3 At oral argument, the court invited St Paul, QAD, QADKK and Wulff  
4 to file motions for sanctions pursuant to 28 USC § 1927 and Rule 11  
5 against Vedatech and Subramanian. Id. All three have since filed  
6 such motions. It is also worth noting that less than one month  
7 after the hearing, on October 9, 2004, Gonzaga filed a motion to  
8 withdraw as Vedatech's attorney. (04-1249 Doc #90) (04-1403 Doc  
9 #47) (04-1818 Doc #27). The court denied this request on October  
10 15, 2004. (02-1249 Doc #95) (04-1403 Doc #47) (04-1818 Doc #27).  
11 On March 16, 2005, Gonzaga (having apparently left the Law Offices  
12 of James Knopf) and Knopf himself filed a second motion to withdraw  
13 as Vedatech's attorney. (02-1249 Doc #148) (04-1403 Doc #70) (04-  
14 1818 Doc #51). This second motion is currently pending.

15 Accordingly, for the sake of clarity, the court will  
16 summarize the motions that are currently pending before this court.  
17 First, St Paul moves this court to remand the third action to state  
18 court. (04-1403 Docs ##11, 40) (04-1818 Docs ##7, 19). Second,  
19 QAD, QADKK, St Paul and Wulff separately move to dismiss the FAC in  
20 the fourth action. (04-1249 Docs ##44, 45, 52). Third, Vedatech  
21 and Subramanian request sanctions against Wulff pursuant to FRCP  
22 11. (04-1249 Doc #61). Fourth, St Paul, QAD, QADKK and Wulff  
23 request sanctions pursuant to FRCP 11 and costs and fees pursuant  
24 to 28 USC § 1927 against Vedatech and Subramanian. (04-1249 Docs  
25 ##86, 97, 106) (St Paul 04-1403 Doc #52) (St Paul 04-1818 Doc #32).

26 Gonzaga and Knopf move to withdraw as counsel of record  
27 for Vedatech. (04-1249 Doc #148) (04-1403 Doc #70) (04-1818 Doc  
28



1 #51). Additionally, Gonzaga and Knopf have filed a motion to  
2 strike portions of Subramanian and Vedatech's opposition to their  
3 second motion to withdrawal. (04-1249 Doc #154) (04-1403 Doc #74)  
4 (04-1818 Doc #55). Subramanian and Vedatech have filed a motion  
5 requesting additional oral argument. (04-1249 Doc #112) (04-1403  
6 Doc #63) (04-1818 Doc #43).

7 Taking a deep breath, the court proceeds to attempt to  
8 resolve these disputes.  
9

10 II

11 Motion to Remand

12 As discussed above, Vedatech and Subramanian's first  
13 petition for removal of the third action (a state declaratory  
14 relief action regarding insurance contracts) is based on one single  
15 piece of logic: "the removability of the underlying [consolidated  
16 action] attaches *mutatis mutandis* to the removability of the  
17 insurance case [third action]." C 04-1403, Doc #6 (Rem Pet) at 5.  
18 Moreover, the second petition for removal states that "the  
19 [consolidated action] [is] completely preempted by [the Copyright  
20 Act]. This, in turn, justifies removal of this derivative action  
21 [third action]." C 04-1818, Doc #1 (Rem Pet) at 5.

22 The court expresses no opinion regarding whether Vedatech  
23 and Subramanian's logic is correct. Assuming *arguendo* that this  
24 logic is correct, it is clear that the absence of a federal  
25 question in the consolidated action would render the third action  
26 unremovable. As mentioned above, this court (per Judge Hamilton)  
27 has not once, but twice, held that the consolidated action contains  
28

1 no federal question sufficient to confer removal jurisdiction  
2 pursuant to 28 USC § 1446(b) and has twice remanded the  
3 consolidated action to state court. In fact, Subramanian and  
4 Vedatech have been threatened with sanctions by Judge Hamilton  
5 should they try again to remove the consolidated action to this  
6 court.

7  
8 Accordingly, the question whether a federal question  
9 exists in the consolidated action has been answered in the negative  
10 by Judge Hamilton - twice. Under plaintiffs' own logic, because  
11 there is no federal question in the consolidated action, this court  
12 must remand the third action for lack of subject matter  
13 jurisdiction pursuant to § 1447(c).

14 Moreover, even if Judge Hamilton's remands were in error  
15 (which clearly they were not) and even if the consolidated action  
16 between QAD, QADKK, Vedatech and Subramanian hinged entirely on the  
17 adjudication of the Copyright Act, this court would still lack  
18 subject matter jurisdiction over the third action.

19 As discussed above, the third action is an action for  
20 declaratory relief brought by St Paul. St Paul seeks a judicial  
21 determination whether it has a duty to defend Vedatech in the  
22 consolidated action if the events underlying the consolidated  
23 action occurred in Japan. This is a matter governed completely by  
24 California law. Under California law, "it has long been a  
25 fundamental rule of law that an insurer has a duty to defend an  
26 insured if [the insurer] becomes aware of, or if the third-party  
27 lawsuit pleads, facts giving rise to the potential for coverage  
28 under the insuring agreement." Waller v Truck Insurance Exchange,

1 Inc, 11 Cal 4th 1, 19 (1995) (citing Gray v Zurich Insurance Co, 65  
2 Cal 2d 263, 276 (1966)). Accordingly, whether St Paul is under a  
3 duty to defend Vedatech in the consolidated action is determined by  
4 comparing the facts alleged in the consolidated action complaint  
5 and the language of the insuring agreement between St Paul and  
6 Vedatech. Even if the underlying claims were federal copyright  
7 claims (which they are not), resolution of the third action would  
8 hinge on whether the insuring agreement's scope was broad enough to  
9 encompass federal copyright claims arising from events that  
10 occurred in Japan. This analysis in no way involves interpretation  
11 of the Copyright Act; it is simply a matter of state contract  
12 interpretation.

13 Further, although Vedatech and Subramanian are diverse  
14 from St Paul, they cannot base their two petitions for removal on  
15 this fact; 28 USC 1446(b) requires a defendant to file a petition  
16 for removal within thirty days of the point when diversity  
17 jurisdiction is established. Vedatech's and Subramanian's  
18 petitions were filed more than two years after St Paul initiated  
19 the third action in state court.

20 No federal question exists in the third action and thus  
21 Vedatech and Subramanian's removal pursuant to 28 USC § 1446(b) was  
22 improper. Accordingly, St Paul's motion to remand 04-1403 and 04-  
23 1818 is GRANTED and the court REMANDS these cases to the Santa  
24 Clara superior court pursuant to 28 USC § 1447(c).

25 St Paul requests that the court order Vedatech and  
26 Subramanian to pay St Paul's reasonable attorney fees and costs  
27 incurred in these motions to remand. 28 USC § 1447(c) provides in  
28

1 relevant part: "An order remanding the case may require payment of  
2 just costs and any actual expenses, including attorney[] fees,  
3 incurred as a result of the removal." As this court stated in  
4 Moore v Kaiser Foundation Hospitals, Inc, 765 F Supp 1464, 1466 (ND  
5 Cal 1991), aff'd 981 F2d 443 (9th Cir 1992):

6 As a matter of public policy, the party forced  
7 to bring a motion to remand an improperly  
8 removed case generally should be fully  
9 reimbursed for its costs in remanding the case  
10 whether the removal was in bad faith or  
11 otherwise. The court's award of fees in this  
12 case is not a punitive award against  
13 defendants; it is simply reimbursement to  
14 plaintiffs of wholly unnecessary litigation  
15 costs the defendants inflicted. Attorney fees  
16 spent to remand an improperly removed case  
17 without bad faith cost just as much as fees  
18 spent to remand a case removed in bad faith.

19 The court orders the remand of this case and,  
20 accordingly, finds that an award of reasonable attorney fees is  
21 appropriate. To determine a reasonable attorney fee award, the  
22 court employs the lodestar method, under which the court multiplies  
23 the number of hours the prevailing party reasonably expended on the  
24 litigation by a reasonable hourly rate. Yahoo!, Inc v Net Games,  
25 Inc, 329 F Supp 2d 1179, 1182 (ND Cal 2004). "[T]o convert the  
26 data provided by fee applicants to a 'reasonable attorney fee,' the  
27 court first compares the requested number of hours to the number of  
28 hours that 'reasonably competent counsel' would have billed." Id  
at 1188.

29 St Paul requests 108.5 hours for services performed by  
30 attorneys in connection with (1) the preparation and filing of both  
31 motions to remand, (2) its reply to Vedatech's and Subramanian's  
32 opposition to its motions to remand and (3) preparation for the  
33 September 16, 2004, hearing. Doc #98, Ex A. Having considered the

1 nature of the complex legal questions created by Vedatech's and  
2 Subramanian's voluminous and repetitive removal petitions and  
3 memoranda, as well as the quality of the attorneys' work, the court  
4 finds the claim for 108.5 hours of attorney time to be reasonable  
5 in preparing and defending its motions to remand in these cases.

6 The court now turns to determining a reasonable hourly  
7 rate. More than one methodology exists to make this determination.  
8 In Laffey v Northwest Airlines, Inc, 572 F Supp 354 (D DC 1983),  
9 aff'd in part, rev'd in part on other grounds, 746 F2d 4 (DC Cir  
10 1984) the court employed a variety of hourly billing rates to  
11 account for the various attorneys' different levels of experience.  
12 The Laffey methodology is useful when an unusually large fraction  
13 of either senior or junior attorney time is necessary, and spent,  
14 by counsel on behalf of a client. The Laffey methodology allows  
15 the court to reflect in the fee award the disproportion of the time  
16 spent by senior or junior attorneys at a rate commensurate with  
17 such attorneys' market hourly rate. Cf In re HPL Technologies Inc,  
18 Securities Litigation, 2005 US Dist LEXIS 7244 (ND Cal 2005)  
19 (Walker, J). In this case, 13.3 hours were spent by James Greenan  
20 who claimed a billing rate of \$250/hour and 96 hours by Enoch Wang  
21 who claimed a \$185/hour billing rate. St Paul requests total fees  
22 of \$20,738.75. Doc #162 at 2; Doc #98, Ex A.

23 A "blended hourly rate" rather than the Laffey  
24 methodology would appear sufficient in this case to reflect the  
25 market rate for counsel's services. This is because "[t]he purpose  
26 of using prevailing market rates is to estimate the hourly rate  
27 reasonably competent counsel would charge[,] \* \* \* [and] not to  
28 determine whether or not a specific attorney could command a

1 specific hourly rate in the market." The court concludes,  
2 therefore, that "the average market rate in the local legal  
3 community as a whole is a better approximation of the hourly rate  
4 that would be charged by reasonably competent counsel than the  
5 actual billing rate charged by a single attorney." Yahoo!, 329 F  
6 Supp 2d at 1185.

7 In several of the court's previous orders, the court has  
8 calculated an average market rate in the local legal community as a  
9 whole using public data from the United States Census Bureau and  
10 Bureau of Labor Statistics ("BLS"). See, e g, Yahoo!, 329 F Supp  
11 2d 1179; Allen v BART, 2003 WL 23333580 (N D Cal 2003); Gilliam v  
12 Sonoma City, 2003 WL 23341211 (N D Cal 2003). In Yahoo!, the court  
13 explained that:

14 The BLS provides data on the hourly wages  
15 earned by attorneys \* \* \*. To estimate the  
16 hourly rates billed to clients, the court first  
17 calculated the ratio of net receipts to gross  
18 receipts from data compiled by the Census  
19 Bureau. This ratio was used to approximate the  
20 overhead costs that would be incorporated in  
the hourly rates billed to clients. The court  
then divided the BLS wage data ( $w$ ) by the ratio  
of net receipts ( $nr$ ) to gross receipts ( $gr$ ) to  
determine an estimated average market rate ( $r$ )  
\* \* \*.

21 Id at 1189.

22 This methodology is represented by the following  
23 equation:  $r = w / (nr/gr)$ . Stated another way, the average market  
24 rate  $r = w * (gr/nr)$ . The most recent census data describing gross  
25 and net receipts by law partnerships are located in "Statistical  
26 Abstract of the United States: 2004-2005" ("2004 Statistical  
27 Abstract"). See United States Census Bureau, Statistical Abstract  
28 of the United States: 2004-2005, tbl 718, available at

1 <http://www.census.gov/statab/www/>. The 2004 Statistical Abstract  
2 provides gross and net receipts for the year 2001. For law  
3 partnerships, gross receipts totaled \$91 billion and net receipts  
4 totaled \$32 billion. This yields a ratio of net receipts to gross  
5 receipts of 0.351. Even though these data are four years old, it  
6 is adequate for present purposes because law firm economics should  
7 not vary significantly over such a short period.

8         The most recent data available from the BLS describing  
9 hourly wages in the San Francisco area are located in "November  
10 2003 Metropolitan Area Occupational Employment and Wage Estimates  
11 San Francisco, CA PMSA," available at  
12 [http://www.bls.gov/oes/current/oes\\_7360.htm#b23-0000](http://www.bls.gov/oes/current/oes_7360.htm#b23-0000) ("2003 BLS  
13 Wage Estimates"). The BLS provides wage estimates for "Legal  
14 Occupations" in the year 2003. The BLS's estimates for lawyers are  
15 a median hourly wage of \$65.01/hr and a mean hourly wage of  
16 \$70.23/hr. Id. As in Yahoo!, the court selects the higher of the  
17 median or mean hourly wage because it is more favorable to the  
18 party seeking the grant of attorney fees. Id at 1191.

19         Dividing the most recent mean hourly wage for lawyers,  
20 \$70.23/hr, by the most recent ratio of net to gross receipts,  
21 0.351, yields an estimate of \$200/hr (rounded down from \$200.08/hr)  
22 as the average market rate for lawyers in the San Francisco area.  
23 This, of course, is fairly close to the claimed hourly rate of St  
24 Paul's counsel. It should not be surprising that a large insurance  
25 company would not allow itself to be overcharged for attorney  
26 services and indeed it appears that St Paul has done just that. In  
27 any event, the court finds that a reasonable or market value  
28 attorney fee for the work of St Paul's counsel is: 108.5 hours at



1 \$200/hr, yielding a total of \$21,700. Accordingly, \$20,738.75, the  
2 amount requested by St Paul, is a reasonable attorney fees award;  
3 indeed, it is actually almost \$1,000 less than the court's  
4 calculation of a market value fee. Given the unitary nature of  
5 both petitions for removal, Vedatech and Subramanian are jointly  
6 and severally liable for the full amount of St Paul's attorney  
7 fees. Kona Enterprises, Inc v Estate of Bishop, 229 F3d 877, 888-  
8 89 (9th Cir 2000); see also Pekarsky v Ariyoshi, 575 F Supp 673,  
9 676-77 (D Hawaii 1983) (Schwarzer, J).

10 Finally, the court turns to St Paul's motion for  
11 sanctions pursuant to FRCP 11(c)(1)(A). This is an appropriate  
12 instance in which to impose FRCP 11 sanctions, as filing a  
13 frivolous removal petition can be grounds for imposition of Rule 11  
14 sanctions if there is no "good faith argument" for removal. Hewitt  
15 v City of Stanton, 798 F2d 1230, 1233 (9th Cir 1986); accord  
16 Midlock v Apple Vacations West, Inc, 2005 US App LEXIS 6718 (7th  
17 Cir 2005).

18 The court will liberally construe the phrase "good faith  
19 argument" and thus will not sanction Vedatech and Subramanian for  
20 the filing of the first petition of removal (although Vedatech and  
21 Subramanian will, as discussed above, pay St Paul's costs on  
22 attorney fees associated with the first petition). No amount of  
23 leniency, however, can excuse the frivolousness of the second  
24 petition for removal of the third action. As discussed above, when  
25 Vedatech and Subramanian removed the third action for the second  
26 time, Judge Conti had not adjudicated the first removal.  
27 Accordingly, there was no action to remove from the state court, as  
28 this court had jurisdiction over the third action as soon as it was



1 removed the first time. 28 USC § 1446(d). To make matters worse,  
2 the second petition (which is hundreds of pages in length)  
3 essentially duplicates the meritless arguments enumerated in the  
4 first petition. Accordingly, to call the second petition  
5 frivolous would be an understatement. The question is not whether  
6 the court should impose sanctions, the question is how much.

7 Rule 11 applies to pro se plaintiffs like Subramanian.  
8 Warren v Guelker, 29 F3d 1386, 1390 (9th Cir 1994). In determining  
9 whether to sanction a pro se plaintiff, however, the Ninth Circuit  
10 urges district courts to use caution. Id. But even exercising  
11 extreme caution, the court determines sanctions are appropriate  
12 against Subramanian. "Rule 11 is intended to \* \* \* deter[]  
13 [parties] who submit motions or pleadings which cannot reasonably  
14 be supported in law or fact." Golden Eagle Distributing Corp v  
15 Burroughs Corp, 801 F2d 1531, 1542 (9th Cir 1986) (emphasis added).  
16 Subramanian has repeatedly abused the federal removal statutes and  
17 shows no signs of stopping this practice. He has filed not one,  
18 but four frivolous petitions for removal, causing continuous and  
19 unnecessary congestion of this court's docket. Moreover, this  
20 court (per Judges Hamilton, Fogel, Conti and the undersigned) has  
21 expended a large amount of judicial resources in adjudicating these  
22 petitions. Clearly, the only way to deter Subramanian from  
23 engaging in this behavior again is to invoke the monetary penalties  
24 of Rule 11.

25 The reprehensible conduct engaged in by Subramanian is  
26 magnified when it is applied to Gonzaga, an attorney. It is clear  
27 that Gonzaga (throughout this litigation) has simply signed off on  
28 a myriad of frivolous motions and pleadings drafted by Subramanian

1 -- including all four petitions for removal. As an officer of this  
2 court, Gonzaga owes a duty not to file papers that are procedurally  
3 defective and substantively indefensible. The second petition for  
4 removal of the third action alone demonstrates that Gonzaga has  
5 egregiously breached her duty to this court. The only method to  
6 deter Gonzaga from engaging in this type of reckless legal  
7 representation where she simply signs off on motions drafted by a  
8 pro se litigant is to invoke Rule 11.

9 In determining the appropriate amount of sanctions, the  
10 court is guided by the touchstone of Rule 11: Deterrence. As  
11 between Subramanian and Gonzaga, the court concludes it is  
12 Subramanian who needs to be deterred more from filing in the future  
13 frivolous motions, petitions and complaints. It is clear from  
14 Gonzaga's motion to withdraw as counsel for Vedatech that she is  
15 suffering the consequences of simply allowing Subramanian to run  
16 the show in this litigation; the court doubts Gonzaga will make  
17 this error in judgment again. Accordingly, the court SANCTIONS  
18 Gonzaga \$5,000 pursuant to Rule 11.

19 Turning to Subramanian, the court concludes that although  
20 a sanction pursuant to Rule 11 is required to deter future  
21 frivolous filings, the large amount of attorney fees and costs  
22 already imposed on Subramanian to compensate St Paul and the amount  
23 that will be imposed on him to compensate Wulff, see *infra* Part  
24 III(B), will certainly serve the function of deterring similar  
25 filings in the future. Accordingly, the court SANCTIONS  
26 Subramanian \$1,000 pursuant to Rule 11. Subramanian is admonished,  
27 however, that the court will not hesitate to impose much harsher  
28 Rule 11 sanctions should he continue to engage in the conduct

1 described in this order. If Subramanian files in this court (1)  
2 another frivolous petition for removal, (2) any frivolous motions  
3 in these cases, (3) a new frivolous cause of action or (4) any  
4 other filing worthy of Rule 11 sanctions, the court will impose  
5 sanctions at \$1,000 per page of each filing.

6 Pursuant to FRCP 11(c)(1)(2), Gonzaga and Subramanian's  
7 sanctions are to be paid to the court on or before July 25, 2005.

8 Finally, to the extent St Paul seeks sanctions relating  
9 to Vedatech and Subramanian's filing of the FAC (as opposed to the  
10 two removal petitions), St Paul's motion is DENIED.

11  
12 III

13 *Motions to Dismiss*

14 As mentioned above, in apparent anger over the settlement  
15 reached between St Paul, QAD and QADKK regarding the consolidated  
16 action, on March 30, 2004, Vedatech and Subramanian filed the  
17 fourth action in this court. Doc #1. On June 15, 2004, Vedatech  
18 and Subramanian filed the FAC. Doc #35. Named as defendants in  
19 the FAC are: (1) St Paul, (2) QAD, (3) QADKK, (4) Wulff and (5) 50  
20 "Doe "defendants. Id. The 49-page, 160-paragraph FAC is truly a  
21 frightful piece of legal work. The FAC (1) makes dozens of  
22 unintelligible factual assertions; (2) is fraught with arguments,  
23 unsupported conclusions and case law citations; (3) contains two  
24 portions written as if the FAC were an opposition to a motion to  
25 dismiss and (4) even contains an internet article concerning  
26 mediation.

27 The complaint lists seven "causes of action": (1)  
28 declaratory judgment; (2) injunctive relief; (3) fraud and

1 conspiracy to commit fraud; (4) constructive fraud and conspiracy  
2 to commit constructive fraud; (5) negligent misrepresentation; (6)  
3 breach of covenant of good faith and fair dealing; and (7) state  
4 unfair competition. As a preliminary matter, the court must  
5 dismiss one of these seven claims out of hand. Vedatech and  
6 Subramanian's "second cause of action" is titled "INJUNCTIVE  
7 RELIEF." Id at 28. Under California law, however, "[i]njunctive  
8 relief is a remedy and not, in itself, a cause of action, and a  
9 cause of action must exist before injunctive relief may be  
10 granted." Shell Oil Co, Inc v Richter, 52 Cal App 2d 164, 168  
11 (1942) (citing Williams v Southern Pacific R R Co, 150 Cal 624  
12 (1907)). Accordingly, Vedatech and Subramanian's claim for  
13 injunctive relief is dismissed pursuant to FRCP 12(b)(6).

14 All defendants (save the Doe defendants) move to dismiss  
15 the FAC in its entirety under various state and federal rules.

16  
17 A

18 *Wulff's Motion to Dismiss*

19 Vedatech and Subramanian allege five causes of action  
20 against Wulff: (1) declaratory judgment; (2) fraud; (3)  
21 constructive fraud; (4) negligent misrepresentation and (5) state  
22 unfair competition. In sum, Vedatech and Subramanian appear to  
23 allege that Wulff was not a neutral mediator but instead was biased  
24 in favor of St Paul which had used his services previously.  
25 Because Wulff was apparently biased towards St Paul, he (1)  
26 "tricked" Vedatech and Subramanian into signing the mediation  
27 confidentiality agreement, (2) did not terminate the mediation when  
28 Vedatech and Subramanian exited and (3) conspired with St Paul and

1 QAD to create a settlement that harmed Vedatech and Subramanian.  
2 The court concludes that Wulff is immune from the claims asserted  
3 against him in the FAC.

4 California law, which this court is required to apply in  
5 diversity actions pursuant to Erie Railroad Co v Tompkins, 304 US  
6 64 (1938), grants "quasi-judicial immunity" to persons who "fulfill  
7 quasi-judicial functions intimately related to the judicial  
8 process." Howard v Drapkin, 222 Cal App 3d 843, 847 (1990). In  
9 Howard, the parties to an underlying custody dispute stipulated  
10 that a psychologist could act as an independent fact-finder and  
11 make non-binding recommendations regarding allegations of physical  
12 and sexual abuse to the judge presiding over the dispute. Id at  
13 848. This stipulation was ultimately signed by the court and  
14 converted into an order. Id. The child's mother subsequently  
15 disagreed with the psychologist's findings and recommendations,  
16 asserting that the psychologist (1) was abusive during the six-hour  
17 mediation-like setting, (2) negligently prepared her findings so as  
18 to include false statements and omit critical information and (3)  
19 failed to disclose certain conflicts of interest and lack of  
20 expertise in child abuse matters. Id.

21 Based upon such allegedly inappropriate behavior, the  
22 mother filed a civil lawsuit against the psychologist, pleading  
23 causes of action for (1) fraud, (2) negligent misrepresentation,  
24 (3) professional negligence, (4) intentional infliction of  
25 emotional distress and (5) negligent infliction of emotional  
26 distress. The psychologist filed a general demurrer, contending  
27 that she enjoyed quasi-judicial immunity from the mother's suit.  
28 Id at 850. The trial court agreed and sustained the demurrer and

1 the California court of appeal affirmed.

2           The Howard court began by stating that "under the concept  
3 of quasi-judicial immunity, California courts have extended  
4 absolute immunity to persons other than judges if those persons act  
5 in a judicial or quasi-judicial capacity." Id at 852-53. Such  
6 persons include court commissioners, grand jurors, administrative  
7 law hearing officers, arbitrators and prosecutors. Id at 853.  
8 Moreover, the court explicitly rejected the idea that only "public"  
9 officials enjoyed quasi-judicial immunity, for "if that were so,  
10 then arbitrators would not be protected by \* \* \* [such] immunity."  
11 Id at 854. The court further noted "the relevant policy  
12 considerations of attracting to an overburdened judicial system the  
13 independent and impartial services and expertise upon which that  
14 system necessarily depends." Id at 857. Accordingly, the court  
15 held that all "nonjudicial persons who fulfill quasi-judicial  
16 functions intimately related to the judicial process should be  
17 given absolute quasi-judicial immunity for damage claims arising  
18 from their performance of duties in connection with the judicial  
19 process." Id.

20           "Without [this] immunity, such persons will be reluctant  
21 to accept court appointments or provide work product for the  
22 courts." Id. Moreover, "in order to best protect the ability of  
23 neutral third parties to aggressively mediate and resolve disputes,  
24 a dismissal at the very earliest stage of the proceedings is  
25 critical to the proper functioning and continued availability of  
26 these services." Id at 905 (emphasis added).

27           Quite appropriately, Wulff cites Howard in support of his  
28 motion to dismiss all claims against him in this case. It is very

1 telling that Vedatech and Subramanian's 25-page opposition to  
2 Wulff's motion to dismiss devotes only two pages squarely to  
3 addressing the Howard decision (while various and unintelligible  
4 other references to Howard are sprinkled throughout). Doc #65 at  
5 15-17. Inexplicably, Vedatech and Subramanian devote twelve pages  
6 of their opposition to reciting (unnecessarily) the status of  
7 quasi-judicial immunity under federal law (i e, statutes and  
8 Supreme Court decisions). Id at 3-14 (concluding that "[i]t is  
9 clear that federal law is conclusively against the grant of any  
10 such immunity to private commercial mediators such as defendant  
11 Wulff."). But it is state law, not federal law, that controls this  
12 court's analysis in diversity cases. See Erie, 304 US 64.

13 Vedatech and Subramanian's opposition makes, in essence,  
14 two arguments why Howard's logic does not mandate the dismissal of  
15 all claims against Wulff. First, they argue that Howard, insofar  
16 as it extended quasi-judicial immunity to "neutral third-party  
17 participants in the judicial process" was "unnecessary dictum," and  
18 thus is not binding on this court under Erie. Doc #65 at 16. At  
19 one point, Vedatech and Subramanian even make the assertion that  
20 Howard's extension of quasi-judicial immunity "is double-dicta."  
21 Id at 15. Next, Vedatech and Subramanian argue that "it is clear \*  
22 \* \* that the California Supreme Court itself is highly unlikely to  
23 uphold the [Howard] decision, and most certainly not for the  
24 extension of immunity to private commercial mediators." Id at 2.  
25 The court finds both arguments to be wholly without merit.

26 Far from being "unnecessary dictum" or "double dicta,"  
27 Howard's holding that "nonjudicial persons who fulfill quasi-  
28 judicial function \* \* \* should be given absolute quasi-judicial



1 immunity" was the court's *ratio decidendi*. In fact, the court  
2 devoted thirteen of the opinion's seventeen pages to the discussion  
3 of quasi-judicial immunity. Moreover, Howard was not appealed to  
4 the California Supreme Court and thus the assertion that Howard  
5 will not be "upheld" by the California Supreme Court is not only  
6 unpersuasive, but plainly wrong. Nor do Vedatech and Subramanian  
7 offer any convincing explanation why the California Supreme Court  
8 would disapprove of the reasoning in Howard. Indeed, Howard has  
9 been binding California precedent for over 14 years and a search of  
10 subsequent treatment of Howard by California courts does not reveal  
11 a single instance of negative treatment among the 22 cases which  
12 have cited it.

13 Under Howard, Wulff is immune from all claims asserted  
14 against him in the FAC. Accordingly, the court GRANTS Wulff's  
15 motion to dismiss with prejudice pursuant to 12(b)(6). Because the  
16 court finds Wulff immune from the claims asserted in the FAC, it is  
17 unnecessary to decide whether communications made by Wulff during  
18 mediation are protected by Cal Civ Code § 47(b) or whether Vedatech  
19 and Subramanian have failed to exhaust state ADR-grievance remedies  
20 pursuant to Cal R Court 1622.

21  
22 B

23 *Rule 11 Sanctions Against Wulff*

24 On August 12, 2004, Vedatech and Subramanian filed a  
25 motion for sanctions pursuant to FRCP 11 against Wulff, his  
26 attorneys Douglas Young and Jessica Nall and the entire law firm of  
27 Farella, Braun & Martel LLP (Farella). Doc #61.

28 Throughout Wulff's motion to dismiss the FAC, Wulff



1 refers to himself as a "court-appointed" mediator, thus deserving  
2 of Howard's immunity. Vedatech and Subramanian claim each time  
3 this label precedes Wulff's name, a "bad faith misrepresentation"  
4 to this court has occurred because the Santa Clara superior court  
5 never "appointed" Wulff as a mediator.

6 Vedatech and Subramanian never specify which part of Rule  
7 11 Wulff has allegedly violated, but since the sanctions are  
8 directed at Wulff's defenses, the court presumes Rule 11(b)(2) is  
9 the relevant provision. Rule 11(b)(2) prohibits claims and  
10 defenses that are not "warranted by existing law or by a  
11 nonfrivolous argument for the extension or modification" of such  
12 law.

13 Far from being unwarranted by existing law, Wulff's claim  
14 that he was a court-appointed mediator is objectively true. Judge  
15 Komar's March 4, 2004, order states that all parties are to attend  
16 mediation before Wulff. Vedatech and Subramanian, however, argue  
17 that this order does not make Wulff court-appointed: "This order  
18 does not in any way 'appoint' Mr Wulff as a mediator, is not  
19 directed to Mr Wulff in any way or manner whatsoever, and does not  
20 create any official relationship between the Court and Mr Wulff."  
21 Doc #61 at 6. Thus, because Judge Komar's order was directed to  
22 the parties, rather than Wulff himself, Wulff is not "court-  
23 appointed" even though all parties were ordered to mediate before  
24 him. Rule 11 sanctions cannot be based upon such meaningless word  
25 play.

26 Further demonstrating the baseless nature of this Rule 11  
27 motion, Subramanian himself recognizes that Howard's grant of  
28 immunity applies to mediators regardless whether the mediator has

1 been court-appointed. See Doc #87 (Nall Decl), Ex C (9/16/04  
2 Transcript) at 54:25-55:2 (acknowledging that "Howard v Drapkin  
3 does not necessitate that the mediator be a court-appointed  
4 mediator in order to qualify under its reasoning for absolute  
5 immunity.")

6 Vedatech and Subramanian's motion to impose Rule 11 upon  
7 Wulff and his attorneys is DENIED.

8 The court may award to the person who prevails on a  
9 motion under Rule 11 reasonable expenses, including attorney fees,  
10 incurred in presenting or opposing the motion. See Advisory  
11 Committee Notes to 1993 Amendments to FRCP 11. Because courts may  
12 award fees to a party that prevails on a Rule 11 motion, "a cross  
13 motion under Rule 11 should rarely be needed." Id. As the target  
14 of, and prevailing party on Vedatech's and Subramanian's Rule 11  
15 motion, Wulff is entitled to an award of attorney fees. The court  
16 will employ the same calculation method explained above in awarding  
17 St Paul its attorney fees under § 1447(c). See *supra* Part III.

18 Wulff requests 197.8 hours for services performed by  
19 attorneys at Farella in (1) researching and drafting an opposition  
20 to Vedatech's and Subramanian's motion for Rule 11 sanctions, (2)  
21 preparing for and attending oral argument on the Rule 11 motion and  
22 (3) researching and drafting Wulff's counter-motion for sanctions.  
23 Doc #87 (Nall Decl) at 3-4. The court finds this to be an  
24 unreasonable expenditure of attorney resources.

25 Among the factors to be taken into account in the  
26 reasonable hours component of the lodestar calculation is (1) the  
27 novelty and complexity of the issues and (2) the quality of the  
28 attorneys' work. Morales v City of San Rafael, 96 F3d 359, 364

1 (9th Cir 1996). Vedatech's and Subramanian's Rule 11 motion is  
2 essentially five pages in length and the alleged grounds for  
3 sanctions are hardly novel or complex. And while the quality of  
4 the attorneys' work is high, Wulff is not entitled recover for  
5 extraordinary hours incurred by a legal dream team; he is entitled  
6 to recover for the number of hours a reasonably competent counsel  
7 would have billed. Additionally, the court does not doubt that the  
8 Farella attorneys spent a large amount of time preparing and  
9 strengthening Wulff's defense; Wulff is a former Farella partner.  
10 The fact that Wulff's attorneys worked almost 200 hours, however,  
11 does not make this number of hours reasonable.

12 Indeed 197.8 hours represents about one-tenth of a  
13 lawyer's annual billable hours. Put in this context, the  
14 unreasonableness of this extraordinary number of hours is evident.  
15 After reviewing (1) Vedatech's and Subramanian's Rule 11 motion,  
16 (2) Wulff's opposition, (3) the time needed to prepare oral  
17 argument and (4) Wulff's counter-motion for sanctions, the court  
18 concludes that it would take a reasonable lawyer about two weeks of  
19 billable time -- or 75 hours -- effectively to oppose Vedatech's  
20 and Subramanian's Rule 11 motion. Multiplying this reasonable  
21 number of hours by the average market rate for lawyers in the San  
22 Francisco area calculated above, the court concludes that Wulff is  
23 entitled to \$15,000 (75 hours x \$200/hour). Accordingly, Vedatech  
24 and Subramanian are jointly and severally liable to Wulff for  
25 \$15,000 incurred in opposing the unnecessary Rule 11 motion.

26 Additionally, Wulff moves for sanctions against Vedatech  
27 and Subramanian pursuant to 28 USC § 1927. Doc #86. Wulff bases  
28 his § 1927 cross-motion on Vedatech and Subramanian's "obstinate

1 refusal to acknowledge the effect of" Howard. Id at 6.

2 "Any \* \* \* person \* \* \* who so multiplies the proceedings  
3 in any case unreasonably and vexatiously may be required by the  
4 court to satisfy personally the excess costs, expenses, and  
5 attorney fees reasonably incurred because of such conduct." 28 USC  
6 § 1927. As this court has stated: The purpose of § 1927 is "to  
7 deter attorneys from multiplying legal proceedings unnecessarily,  
8 and to compensate attorneys forced to endure such proceedings."  
9 Winfield v Beverly Enterprises, 1994 US Dist LEXIS 2855, \*10 (ND  
10 Cal 1994) (Walker, J). Sanctioning a party under § 1927 requires a  
11 "finding of recklessness or bad faith." Barber v Miller, 146 F3d  
12 707, 711 (9th Cir 1998). "Bad faith is present when a [party]  
13 knowingly or recklessly raises a frivolous argument." Estate of  
14 Blas v Winkler, 792 F2d 858, 860 (9th Cir 1986). Finally, "section  
15 1927 sanctions may be imposed on a pro se plaintiff." Wages v IRS,  
16 915 F2d 1230, 1235-36 (9th Cir 1990).

17 The court agrees that Vedatech and Subramanian,  
18 recklessly and in bad faith, multiplied the legal proceedings  
19 against Wulff by recklessly raising frivolous arguments regarding  
20 the inapplicability of Howard. Wulff repeatedly and clearly  
21 informed Vedatech and Subramanian of Howard's holding regarding  
22 quasi-judicial immunity and urged Vedatech and Subramanian to  
23 dismiss Wulff from the current suit. Vedatech and Subramanian  
24 refused and instead chose to make substantively indefensible  
25 attempts to distinguish Howard. First, they argued that Wulff was  
26 not "court appointed," as was the psychologist in Howard. This  
27 argument, however, has since been repudiated by Vedatech and  
28 Subramanian. Doc #128 at 7 (admitting that "the psychologist in

1 Howard v Drapkin was not 'court-appointed'). Next, Vedatech and  
2 Subramanian argued that this court should not follow Howard because  
3 (1) the holding regarding quasi-judicial immunity is mere "dictum,"  
4 and (2) the California Supreme Court is imminently preparing to  
5 overrule Howard. These legal contentions are unwarranted by  
6 existing law. As discussed above, there is no indication that this  
7 fourteen-year-old decision, relied upon by numerous lower courts,  
8 is about to be overruled by the California Supreme Court; Vedatech  
9 and Subramanian's conclusory assertion to the contrary is baseless  
10 and not offered in good faith. Finally, calling Howard's quasi-  
11 judicial immunity holding "dictum" evidences a fundamental  
12 ignorance (either intentional or reckless) of the ability to read  
13 case law. This ignorance, however, is no defense to Wulff's cross-  
14 motion for fees and costs. See Temple v WISAP USA, 1993 US Dist  
15 LEXIS 18453, \*19 (D Neb 1993) ("Mistaken judgment, ignorance of law  
16 or personal belief with regard to what the law should be," does not  
17 negate the filing of a legally baseless document).

18 No doubt Vedatech and Subramanian wish Howard did not  
19 exist or that its holding could be characterized as dictum. These  
20 personal beliefs, however, do not constitute good faith legal  
21 arguments. The court concludes that Wulff should never have been  
22 forced into defending himself against Vedatech and Subramanian's  
23 vexatious, frivolous and legally deficient claims in the FAC; he  
24 should have been dismissed from the outset. Vedatech and  
25 Subramanian, however, "unreasonably and vexatiously" multiplied the  
26 proceedings in this case against Wulff as prohibited by § 1927.

27 Accordingly, the court GRANTS Wulff's motion for § 1927  
28 sanctions. Wulff states that his attorneys billed 290.9 hours for

1 services performed and \$2,300 in costs incurred in researching and  
2 drafting his motion to dismiss the FAC. Doc #87 at 4. All  
3 attorneys at Farella who worked on Wulff's case, however, charged a  
4 uniform "reduced rate" of \$225/hour. Id. Accordingly, Wulff  
5 claims he incurred \$67,752.50 in attorney fees, costs and expenses  
6 associated with defending against the FAC (290.0 hours x \$225/hour  
7 = \$65,452.50 + \$2,300 in costs = \$67,752.50). This amount seems  
8 too high. This is confirmed by Wulff's request for only one-third  
9 of this amount, \$22,584.16 or, alternatively, \$70/hour (\$22,584.16  
10 - \$2,300 = \$20,284.16 / 290.9 = \$69.73/hour). Id at 5.

11 Farella does not fully explain the steep discount from  
12 their claimed normal billing rates. This seems to confirm that  
13 counsel's so-called normal billing rates are the starting point for  
14 negotiations concerning fees. In any event, in this case, the  
15 court need not explore all the details as the amount claimed by  
16 Wulff appears reasonable. Applying the \$200/hr average market rate  
17 (not the \$225/hour rate of the Farella attorneys) to the requested  
18 \$20,284.16 for attorney fees, it appears Wulff's request for fees  
19 is tantamount to seeking compensation for 101.42 hours reasonably  
20 expended in defending against the FAC ( $\$20,284.16 / \$200 = 101.42$ ).

21 Having considered the tangled and complicated nature of  
22 the legal and factual issues raised by Vedatech's and Subramanian's  
23 49-page FAC, as well as the quality of the attorneys' work product,  
24 the court finds the claim for 101.42 hours of attorney services and  
25 \$2,300 in legal research and duplicating costs to be reasonable in  
26 preparing and defending Wulff's motion to dismiss the hefty FAC.  
27 Accordingly, the court finds the following award of attorney fees  
28 and costs justified: 101.42 hours at \$200/hour, yielding \$20,284.

1 The court then adds the \$2,300 incurred in duplication and legal  
2 research, yielding the requested total of \$22,584.

3 Accordingly, pursuant to § 1927, the court finds  
4 Subramanian and Vedatech jointly and severally liable to Wulff for  
5 \$22,584 in attorney fees, costs and expenses incurred in defending  
6 against the FAC.

8 C

9 *St Paul's and QAD's Motions to Dismiss*

10 St Paul, QAD and QADKK all move to dismiss the FAC in its  
11 entirety pursuant to FRCP 12(b)(6). Docs #44 (St Paul Mot), #45  
12 (QAD/QADKK Mot). Because the legal arguments offered by St Paul  
13 and QAD in support of their individual motions substantially  
14 overlap and because Vedatech and Subramanian address both motions  
15 in a single opposition memorandum, Doc #66, the court will address  
16 these two dispositive motions in tandem.

18 1

19 FRCP 12(b)(6) motions to dismiss essentially "test  
20 whether a cognizable claim has been pleaded in the complaint."  
21 Scheid v Fanny Farmer Candy Shops, Inc, 859 F2d 434, 436 (6th Cir  
22 1988). Although a plaintiff is not held to a "heightened pleading  
23 standard," the plaintiff must provide more than mere "conclusory  
24 allegations." Swierkiewicz v Sorema NA, 534 US 506, 515 (2002)  
25 (rejecting heightened pleading standards); Schmier v United States  
26 Court of Appeals for the Ninth Circuit, 279 F3d 817, 820 (9th Cir  
27 2002) (rejecting conclusory allegations).

28 Under Rule 12(b)(6), a complaint "should not be dismissed



1 for failure to state a claim unless it appears beyond doubt that  
2 the plaintiff can prove no set of facts in support of his claim  
3 which would entitle [her] to relief." Hughes v Rowe, 449 US 5, 9  
4 (1980) (citing Haines v Kerner, 404 US 519, 520 (1972)); see also  
5 Conley, 355 US at 45-46. All material allegations in the complaint  
6 must be taken as true and construed in the light most favorable to  
7 plaintiff. See In re Silicon Graphics Inc Sec Lit, 183 F3d 970,  
8 980 n10 (9th Cir 1999). But "the court [is not] required to accept  
9 as true allegations that are merely conclusory, unwarranted  
10 deductions of fact, or unreasonable inferences." Spewell v Golden  
11 State Warriors, 266 F3d 979, 988 (9th Cir 2001) (citing Clegg v  
12 Cult Awareness Network, 18 F3d 752, 754-55 (9th Cir 1994)).

13 Review of a FRCP 12(b)(6) motion to dismiss is generally  
14 limited to the contents of the complaint, and the court may not  
15 consider other documents outside the pleadings. Arpin v Santa  
16 Clara Valley Transp Agency, 261 F3d 912, 925 (9th Cir 2001). The  
17 court may, however, consider documents attached to the complaint in  
18 connection with a motion to dismiss. Parks School of Business, Inc  
19 v Symington, 51 F3d 1480, 1484 (9th Cir 1995). Additionally, the  
20 court may consider "documents whose contents are alleged in a  
21 complaint and whose authenticity no party questions, but which are  
22 not physically attached to the pleading." See Lapidus v Hecht, 232  
23 F3d 679, 682 (9th Cir 2000) (internal quotation omitted).

24  
25 2

26 *Declaratory Relief*

27 In their first cause of action, Vedatech and Subramanian  
28 ask this court for a declaratory judgment pursuant to 28 USC §



1 2201. Regarding St Paul, Vedatech and Subramanian seek fourteen  
2 judicial declarations. Doc #35 (FAC) at 25-27. This lengthy list  
3 of requested declarations, in essence, requests this court to  
4 declare that: (1) the settlement agreement with QAD is null and  
5 void; (2) St Paul had no authority to enter into this agreement and  
6 (3) St Paul has acted in bad faith and breached its fiduciary  
7 duties to Vedatech and Subramanian in entering into the settlement  
8 agreement. Regarding QAD and QADKK, Vedatech and Subramanian ask  
9 this court to declare that: (1) QAD and QADKK cannot rely upon the  
10 settlement agreement as a defense to Vedatech and Subramanian's  
11 affirmative claims in the second action and (2) any release of  
12 claims (affirmative or counterclaims) by QAD and QADKK under the  
13 settlement agreement are final.

14 The court begins by noting the contradictory nature of  
15 these requested declarations; Vedatech and Subramanian ask the  
16 court to declare the settlement agreement non-binding on Vedatech  
17 and Subramanian, but then request the court declare it binding and  
18 final on QAD and QADKK. More importantly, however, the court notes  
19 the duplicative nature of these declarations - the issues  
20 underlying these declarations (e g, the validity of the agreement,  
21 St Paul's authority to enter into the agreement and the presence of  
22 bad faith) are all squarely before the Santa Clara superior court  
23 in the twice-remanded consolidated action and in the now-remanded  
24 third action. Whether the settlement agreement is binding, void,  
25 unconscionable or the product of bad faith are all arguments that  
26 can be made to Judge Komar, the judge who will actually be the one  
27 to enforce the settlement agreement in the consolidated action.  
28 Moreover, Vedatech and Subramanian recognize this fact in their

1 opposition by stating: "Any effect of any order preventing QAD and  
2 St Paul from proceeding with their "settlement," will be exactly  
3 the same as an order that may be obtained within either of the  
4 underlying cases." Doc #66 at 6-7. The court agrees with Vedatech  
5 and Subramanian's assertion.

6 Accordingly, Vedatech and Subramanian are asking the  
7 court to issue a declaratory judgment regarding certain contractual  
8 rights they, St Paul, QAD and QADKK may or may not have in two  
9 pending state court cases. It is clear that Vedatech and  
10 Subramanian are wary regarding whether Judge Komar will decide to  
11 enforce the settlement agreement. This apprehension, however, is  
12 insufficient to justify this court exercising its discretion to  
13 issue declaratory relief. The Ninth Circuit has made clear that  
14 the purpose of declaratory relief in federal courts is not to  
15 "provide insurance against [a] state court deciding the \* \* \*  
16 issues less favorably than a district court." Exxon Shipping Co v  
17 Airport Depot Diner, Inc, 120 F3d 166, 169 (9th Cir 1997).  
18 "Declaratory relief is not authorized so that lower federal courts  
19 can sit in judgment over state courts, and it is not a substitute  
20 for removal." Id at 170 (emphasis added). See also 26 CJS  
21 Declaratory Judgments § 120 ("The declaratory judgment procedure  
22 should not be employed by federal courts to control state action,  
23 or to bring into the federal courts actions which are pending in  
24 the state courts.").

25 Under Exxon, Vedatech and Subramanian cannot avoid Judge  
26 Komar's adjudication of issues squarely before him in state court  
27 by seeking declaratory relief in federal court. Accordingly, the  
28 court refuses to exercise its discretion in issuing declaratory

1 relief and GRANTS St Paul's, QAD and QADKK's motions to dismiss  
2 with prejudice Vedatech and Subramanian's first cause of action for  
3 declaratory relief.

4  
5 3

6 *Fraud*

7 Next, Vedatech and Subramanian assert causes of action  
8 for fraud against St Paul, QAD and QADKK. Doc #35 (FAC) at 31-35.  
9 Vedatech and Subramanian contend that St Paul intentionally "failed  
10 to disclose the nature and details of [its] prior contacts and  
11 relationship with Wulff." Id at 32. St Paul intentionally  
12 withheld this information, according to Vedatech and Subramanian,  
13 to "induce them to attend the mediation under terms that were  
14 favorable to [St Paul, QAD and QADKK] and harmful to [Vedatech and  
15 Subramanian]." Id at 33. Moreover, QAD and QADKK "became aware of  
16 [St Paul's] fraudulent schemes during the mediation," but "with an  
17 intent to harm Vedatech [and Subramanian] \* \* \* QAD participated in  
18 the ongoing fraudulent scheme \* \* \* rel[ying] upon the idea that  
19 the cloak of secrecy in mediation can be used to engage in  
20 fraudulent and collusive schemes \* \* \*." Id at 35. Finally,  
21 Vedatech and Subramanian assert that they indeed relied upon these  
22 fraudulent omissions when they "consented" to attend the mediation  
23 and thus the fraud has caused them "heavy damages." Id at 34.

24 To prevail on a claim for fraud in California, Vedatech  
25 and Subramanian must prove by a preponderance of the evidence that:  
26 (1) St Paul, QAD and QADKK made a knowingly false representation;  
27 (2) the false representation was made with the intent to deceive or  
28 induce reliance by Vedatech and Subramanian; (3) Vedatech and

1 Subramanian justifiably relied on these false representations; and  
2 (4) they incurred damages resulting from the fraud. Smith v  
3 Allstate Insurance Co, 160 F Supp 2d 1150, 1152 (SD Cal 2001)  
4 (citing Wilkins v Nat'l Broadcasting Co, 71 Cal App 4th 1066  
5 (1999)). Additionally, alleged material omissions (as alleged in  
6 this case) may constitute a "false representation" under the first  
7 element of fraud "when the defendant[s] had exclusive knowledge of  
8 material facts not known to the plaintiff[s]." Wilkins, 71 Cal App  
9 4th at 1082.

10 The court cannot grant St Paul's, QAD's and QADKK's  
11 12(b) (6) motion to dismiss unless it appears beyond doubt that  
12 Vedatech and Subramanian can prove no set of facts in support of  
13 their fraud claim which would entitle them to relief. Hughes, 449  
14 US at 9.

15 Vedatech and Subramanian claim that St Paul, QAD and  
16 QADKK concealed a material fact (known only to them) when they  
17 failed to disclose that Wulff had conducted prior meditations for  
18 St Paul. Assuming that St Paul withheld such information, under  
19 Wilkins, such an omission could meet the first element of a fraud  
20 claim. Next, they claim that these omissions and representations  
21 were made to induce Vedatech and Subramanian to consent to  
22 mediation before Wulff and thus the second element of a fraud claim  
23 could be proven. Vedatech and Subramanian's own submissions to the  
24 court, however, show that they can prove no set of facts that would  
25 meet the third and fourth elements of a fraud claim. Vedatech and  
26 Subramanian assert that they "were unaware of the information that  
27 was deliberately withheld from them, and relied upon these  
28 misrepresentations \* \* \* in consenting" to attend mediation before

1 Wulff. Doc #35 at 34. No facts can support this assertion for,  
2 quite simply, it is not true. Vedatech and Subramanian did not  
3 "consent" to mediate before Wulff; they were ordered -- twice -- by  
4 Judge Komar to attend the Wulff mediation. Judge Komar first  
5 ordered Vedatech and Subramanian to attend this mediation on  
6 February 6, 2004. Doc #84, Ex 6 (Med Order) ("It is ORDERED that  
7 Mani Subramanian is required by the Court to appear in person at  
8 mediation with St Paul and QAD parties in front of Randall Wulff \*  
9 \* \*. Failure to appear at the mediation will bring Mr Subramanian  
10 in contempt of the Court \* \* \*."). What is more, it was Vedatech  
11 and Subramanian, not any of the defendants, that supplied the court  
12 with a copy of Judge Komar's February 6, 2004, order. On March 4,  
13 2004, Judge Komar again ordered the parties to attend mediation  
14 before Wulff. Doc #46, Ex B (2d Med Order). Accordingly, Vedatech  
15 and Subramanian cannot prove facts showing their attendance at the  
16 mediation was based upon justifiable reliance on defendants'  
17 alleged omissions; their attendance was based upon court order.  
18 Because they can offer no facts to prove this third element of  
19 fraud, Vedatech and Subramanian have failed to state a cause of  
20 action for fraud.

21 Because St Paul, QAD and QADKK cannot be held liable in  
22 tort for fraud, it follows that none can be liable for conspiracy  
23 to commit fraud. "Standing alone, a conspiracy does no harm and  
24 engenders no tort liability. It must be activated by the  
25 commission of an actual tort. A civil conspiracy, however  
26 atrocious, does not per se give rise to a cause of action unless a  
27 civil wrong has been committed resulting in damage." Allied  
28 Equipment Corp v Litton Saudi Arabia Limited, 7 Cal 4th 503, 511

1 (1994) (internal quotations and citation omitted).

2 For these reasons, St Paul's, QAD's and QADKK's motions  
3 to dismiss with prejudice the FAC's claims of fraud and conspiracy  
4 to commit fraud are GRANTED.

6 4

7 *Constructive Fraud*

8 Next, Vedatech and St Paul assert a cause of action for  
9 constructive fraud against St Paul. Doc #35 at 36. For the  
10 reasons discussed above in connection with dismissal of the fraud  
11 claims, Vedatech and Subramanian have failed to state a claim for  
12 constructive fraud.

13 "Unlike actual fraud, constructive fraud depends on the  
14 existence of a fiduciary relationship of some kind \* \* \*. The  
15 elements of the cause of action for constructive fraud are: (1)  
16 fiduciary relationship; (2) nondisclosure (breach of fiduciary  
17 duty); (3) intent to deceive, and (4) reliance and resulting injury  
18 (causation)." Younan v Equifax, Inc, 111 Cal App 3d 498, 516-17n14  
19 (1980). Vedatech and Subramanian assert that St Paul owed them a  
20 fiduciary duty as an insurer and thus element one is met (QAD and  
21 QADKK have no fiduciary relationship with Vedatech and  
22 Subramanian). Next, they claim that St Paul failed to disclose its  
23 prior connections with Wulff with the intent to deceive Vedatech  
24 and Subramanian into consenting to attend the mediation (element  
25 two and three). The fact that Judge Komar ordered Vedatech and  
26 Subramanian to attend the Wulff mediation, however, prevents them  
27 from proving facts to support the last element of constructive  
28 fraud. Again, Vedatech and Subramanian's attendance at the

1 mediation was not the product of reliance on any alleged omission  
2 by St Paul; the attendance was court-ordered.

3 For the same reasons discussed above in relation to  
4 conspiracy to commit fraud, Vedatech and Subramanian cannot state a  
5 cause of action for conspiracy to commit constructive fraud. See  
6 *supra* Part IV(C) (3). St Paul's motion to dismiss with prejudice  
7 the FAC's claim of constructive fraud and conspiracy to commit  
8 constructive fraud is GRANTED.

9  
10 5

11 *Negligent Misrepresentation*

12 Next, Vedatech and Subramanian assert a cause of action  
13 against St Paul for negligent misrepresentation. Doc #35 at 39.  
14 The allegations underlying this claim are the same omissions used  
15 to form the basis for the fraud and constructive fraud claims (i e,  
16 failure to disclose St Paul's prior connection with Wulff). In  
17 California, however, negligent misrepresentation requires a  
18 "positive" assertion or representation which is false;  
19 representation by omission is not sufficient. *Byrum v Brand*, 219  
20 Cal App 3d 926, 942 (1990). See also *Sharp v Hawkins*, 2004 US Dist  
21 LEXIS 22928, \*11 (ND Cal 2004) (stating that under California law,  
22 "omissions or non-disclosure \* \* \* standing alone are insufficient  
23 to sustain a claim for negligent misrepresentation." (citing *Byrum*,  
24 219 Cal App 3d at 942)).

25 Because Vedatech and Subramanian's claim for negligent  
26 misrepresentation is based upon non-disclosures, the court GRANTS  
27 St Paul's motion to dismiss with prejudice the FAC's claims for  
28 negligent misrepresentation.



*Insurance Bad Faith*

Next, Vedatech and Subramanian assert a cause of action against St Paul for "insurance bad faith (breach of covenant of good faith and fair dealing)." Doc #35 at 40-42. In support of this claim, Vedatech and Subramanian offer the court a laundry list of alleged bad faith acts committed over a period of years by St Paul. Id. The court, however, need not determine whether Vedatech and Subramanian have stated a cause of action for "insurance bad faith," for even if such a claim has been stated, the court must abstain from adjudicating this claim pursuant to Colorado River Water Conservation District v United States, 424 US 800 (1976).

As ordered above, the third action is remanded back to state court (State Docket No 1-02-CV-805197). See *supra* Part III. In the third action, St Paul seeks a judicial declaration regarding the scope of its duty to defend Vedatech and Subramanian in relation to the consolidated action as well as other issues surrounding the insurance policy. Vedatech and Subramanian filed a counterclaim in the this action alleging "insurance bad faith." In fact, just prior to removing the third action to this court, Vedatech and Subramanian filed their 112-page fourth amended cross-complaint against St Paul in state court. See 1-02-CV-805197, Doc #121. Moreover, in asserting the claim for insurance bad faith, the FAC directs the court's attention to the state court fourth amended cross-complaint in the third action to detail fully the bad faith allegations against St Paul. Doc #35 (FAC) at 40. Because the court has now remanded the third action back to state court, there are now two "insurance bad faith" claims asserted by Vedatech



1 and Subramanian against St Paul; one is in state court and the  
2 other is in federal court.

3 As this court has recently stated, "the Colorado River  
4 doctrine permits [dismissal of a case] in the interests of wise  
5 judicial administration when substantially similar claims are  
6 pending in state court." Le v County of Contra Costa, 1999 US Dist  
7 LEXIS 19611, \*2 (ND Cal 1999) (Walker, J) (citations omitted).  
8 "The threshold question is whether the state and federal suits are  
9 substantially similar." Id at 3 (citing Nakash v Marciano, 882 F2d  
10 1411, 1416 (9th Cir 1989)). "If so, the factors to consider are:  
11 (1) the desirability of avoiding piecemeal litigation; (2) the  
12 inconvenience of the federal forum; (3) the order in which  
13 jurisdiction was obtained; (4) the source of the governing law and  
14 (5) whether the state court proceedings could adequately protect  
15 the federal plaintiff's rights." Id (citing Martinez v Newport  
16 Beach City, 125 F3d 777, 785 (9th Cir 1997)). Additionally, the  
17 court may consider whether the plaintiff in the federal action has  
18 engaged in forum shopping. Silvaco Data Systems, Inc v Technology  
19 Modeling Associates, Inc, 896 F Supp 973, 975 (ND Cal 1995) (citing  
20 Nakash, 882 F2d at 1417).

21 Here, the combination of these factors make a compelling  
22 case for abstention under Colorado River. First, the state and  
23 federal suits involve the same parties and claims and arise out of  
24 the same conduct. California law regarding contracts and insurance  
25 will govern both cases. Piecemeal litigation would certainly  
26 result if the federal action were to proceed. The state court  
27 obtained jurisdiction first; well over two years prior to the  
28 federal court. The convenience factor is neutral. With respect to

1 the rights of Vedatech and Subramanian, the court is convinced that  
2 the state court is up to the task of deciding state law claims  
3 arising from an alleged breach of the duty of good faith and fair  
4 dealing. Finally, to say that Vedatech and Subramanian have  
5 engaged in forum shopping would be an understatement; they are  
6 desperate to obtain a federal forum to prevent the state court from  
7 enforcing the settlement agreement, and they have employed several  
8 inappropriate means to attain this forum. These reasons, plus an  
9 obvious advancement of judicial economy, convince the court it  
10 should abstain from adjudicating Vedatech and Subramanian's claim  
11 for insurance bad faith to avoid duplicative state proceeding.

12 "[D]istrict courts must stay, rather than dismiss, an  
13 action when they determine that they should defer to the state  
14 court proceedings under Colorado River." Coopers & Lybrand v Sun-  
15 Diamond Growers of California, 912 F2d 1135, 1138 (9th Cir 1990)  
16 (emphasis added). Accordingly, the court DENIES St Paul's motion  
17 to dismiss the claim for insurance bad faith. Rather, the court  
18 STAYS adjudication of this claim pending the resolution of  
19 Vedatech's and Subrmanian's fourth amended counterclaim in the  
20 third action in the Santa Clara superior court.

21 Vedatech and Subramanian shall file with the court a  
22 status report within 30 days of disposition of the insurance bad  
23 faith claim in state court. Failure timely to file such a report  
24 shall be deemed a failure to prosecute and result in dismissal of  
25 this action. To be clear, Vedatech and Subramanian are not to file  
26 any other memoranda relating to this cause of action save the above  
27 described status report.  
28

*Unfair Competition*

Finally, Vedatech and Subramanian assert a claim for unfair competition against St Paul, QAD and QADKK pursuant to Cal Bus & Prof Code § 17200 et seq. Cal Bus & Prof Code § 17203 provides, in pertinent part, that:

any person who \* \* \* has engaged \* \* \* in unfair competition may be enjoined \* \* \*. The court may make such orders or judgments \* \* \* as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

For the purposes of the current claim, the term "unfair competition" is defined as "any unlawful, unfair or fraudulent business act or practice." Cal Bus & Prof Code § 17200.

According to Vedatech and Subramanian, St Paul, QAD and QADKK have engaged in a "pattern of behavior that is unlawful, unfair or fraudulent," including (as with most other claims in the FAC): (1) St Paul's failure to disclose its prior contacts with Wulff, (2) fraudulently obtaining Vedatech and Subramanian's "consent" to attend the mediation and (3) QAD and QADKK learning of such deception and failing to disclose it in order to "benefit to the tune of \$500,000." Doc #35 (FAC) at 42-46. In essence, Vedatech and Subramanian claim that St Paul and QAD engaged in unfair competition by fraudulently obtaining Vedatech and Subramanian's consent to attend mediation and the resulting injury was the settlement agreement between St Paul, QAD and QADKK which (1) deprived Vedatech and Subramanian of their right to pursue affirmative claims against QAD and QADKK and (2) unjustly enriched QAD and QADKK by \$500,000 which belonged to Vedatech and

1 Subramanian.

2 The FAC seeks restitution from QAD and QADKK in the  
3 amount of \$500,000 and requests (nebulously) the court to order St  
4 Paul to disgorge "all benefits that are due to Vedatech under the  
5 California Unfair Competition laws." Vedatech and Subramanian are  
6 careful to frame all requested relief in the form of equitable  
7 remedies, as § 17203 does not allow damages to be recovered. Korea  
8 Supply Co v Lockheed Martin Corp, 29 Cal 4th 1134, 1144 (2003).

9 For several reasons, Vedatech and Subramanian can prove no set of  
10 facts to support this cause of action and thus the claim must be  
11 dismissed pursuant to FRCP 12(b)(6).

12 First, as the court discussed above, no fraudulent or  
13 unfair practice on the part of St Paul, QAD or QADKK caused  
14 Vedatech and Subramanian to attend the mediation; attendance was  
15 court-ordered by Judge Komar -- twice. Next, assuming arguendo  
16 that the alleged non-disclosures did trick Vedatech and Subramanian  
17 into attending the Wulff mediation, they cannot prove that the  
18 resulting settlement agreement (the genesis of all ensuing  
19 "damages") was, in the words of § 17203, "acquired by means of such  
20 unfair competition." The settlement agreement explicitly states  
21 that "it is not intended to impair the prosecution by Vedatech of  
22 any and all affirmative claims that may exist with respect to the  
23 First or Second Action \* \* \*." Doc #35 (FAC), Ex A (Sett  
24 Agreement) at 5 ¶8. Moreover, as mentioned above, the settlement  
25 agreement was not entered into until after Vedatech and Subramanian  
26 left the mediation. If Vedatech and Subramanian were not present  
27 when the settlement agreement was negotiated, it follows that the  
28 settlement agreement could not have been acquired by the means of

## United States District Court

For the Northern District of California

1 St Paul, QAD and QADKK's alleged fraudulent scheme to trick  
2 Vedatech and Subramanian into attending the mediation.

3 Finally, even if St Paul, QAD and QADKK engaged in unfair  
4 practices (which the court assumes solely for this motion) and even  
5 if these practices tricked Vedatech and Subramanian into attending  
6 the mediation (which clearly they did not), Vedatech and  
7 Subramanian can prove no facts showing that they are entitled to  
8 any equitable relief. First, Vedatech and Subramanian's nebulous  
9 assertion that they are entitled to require St Paul to "disgorge  
10 all such benefits that are due" to Vedatech and Subrmanian is  
11 conclusory and unwarranted and thus does not suffice to state a  
12 cause of action. St Paul received nothing via the settlement  
13 agreement that the court can order them to disgorge (if anything,  
14 St Paul was forced to pay \$500,000). Nor can Vedatech and  
15 Subramanian prove that they are entitled to restitution of the  
16 \$500,000 which was paid to QAD and QADKK by St Paul.

17 "[R]estitution [is an order] compelling a [] defendant to return  
18 money obtained through an unfair business practice to those persons  
19 \* \* \* who had an ownership interest in the property \* \* \*." Korea  
20 Supply Co, 29 Cal 4th at 1144-45. Vedatech and Subramanian,  
21 however, have pled no facts showing that they have any ownership  
22 interest in the \$500,000 St Paul paid to QAD and QADKK. Rather,  
23 the FAC simply states that St Paul paid QAD and QADKK the \$500,000  
24 "from funds that [were] held in trust for the Vedatech parties."  
25 Doc #35 at 47. This legal conclusion, however, is not supported by  
26 any facts pled in the FAC and legal conclusions, standing alone,  
27 cannot suffice to state a cause of action. See Sprewell, 266 F3d  
28 at 988 ("the court [is not] required to accept as true allegations

1 that are merely conclusory, unwarranted deductions of fact, or  
2 unreasonable inferences.").

3 For the numerous and substantial reasons discussed above,  
4 St Paul's, QAD's and QADKK's motions to dismiss with prejudice the  
5 FAC's seventh cause of action for unfair competition are GRANTED.

6

7

#### IV

8

#### *QAD and QADKK Motion for Sanctions*

9

10 Finally, QAD and QADKK move this court to sanction  
11 Vedatech and Subramanian pursuant to FRCP 11. The court, however,  
12 has already sanctioned Vedatech, Subramanian and Gonzaga for the  
13 improper behavior each has demonstrated throughout this litigation  
14 and the court does not believe any further Rule 11 sanctions are  
15 appropriate at this time. Additionally, QAD and QADKK move for  
16 sanctions pursuant to § 1927. The court does not believe such  
17 sanctions are appropriate. QAD and QADKK have not had to defend  
18 two frivolous petitions for removal (at least not in the present  
19 action) as St Paul has had to do, nor have QAD and QADKK had to  
20 defend a frivolous Rule 11 motion as Wulff has had to do. QAD and  
21 QADKK were named in the FAC, they filed a motion to dismiss and the  
22 motion is now being adjudicated. No doubt QAD and QADKK have  
23 incurred costs and fees in defending against the FAC. But every  
24 defendant incurs costs and fees. The costs and fees awarded to St  
25 Paul and Wulff above did not stem from simply being named in the  
26 FAC and having to defend themselves.

27 QAD and QADKK's motion to sanction is DENIED.

28 //

//

V

In sum, the court GRANTS St Paul's motions (04-1403 Docs ##11, 40) (C-04-1818 Docs ##7, 19) to remand and REMANDS Nos 04-1818 and 04-1403 to Santa Clara superior court. The court ORDERS Vedatech and Subramanian to pay \$20,738.75 to St Paul pursuant to 28 USC § 1447(c). Additionally, the court GRANTS St Paul's motion for Rule 11 sanctions. (04-1249 Doc #97) (04-1403 Doc #52) (04-1818 Doc #32) and SANCTIONS Subramanian \$1,000 and SANCTIONS Gonzaga \$5,000. These sanctions are payable to the court on or before July 25, 2005.

The court GRANTS Wulff's motion to dismiss (04-1249 Doc #52). The court DENIES Vedatech's and Subramanian's motion for Rule 11 sanctions against Wulff (04-1249 Doc #61). The court ORDERS Vedatech and Subramanian to pay Wulff \$15,000 for fees and costs incurred in opposing the Rule 11 motion. Additionally, the court GRANTS Wulff's motion for sanctions pursuant to § 1927 (04-1249 Doc #86) and ORDERS Vedatech and Subramanian to pay \$22,584 to Wulff.

QAD's and QADKK's motions to dismiss with prejudice all claims asserted against them are GRANTED (04-1249 Doc #44). QAD and QADKK's motion for sanctions are DENIED (04-1249 Doc #106). St Paul's motion to dismiss the FAC is GRANTED IN PART (04-1249 Doc #45). The court STAYS adjudication of Vedatech's and Subramanian's claim for insurance bad faith against St Paul.

Hence, every action and claim (save one) to which Vedatech is a party has been either remanded or dismissed and the one remaining claim has been stayed pending state court resolution. Accordingly, the court does not find it appropriate to rule on

1 Gonzaga's and Knopf's second motion to withdraw as counsel for  
2 Vedatech. If they still wish to withdraw as counsel, they should  
3 address their arguments to the Santa Clara superior court.  
4 Accordingly, the second motion to withdraw is DENIED as moot (04-  
5 1249 Doc #148) (04-1403 Doc #70) (04-1818 Doc #51). Gonzaga and  
6 Knopf's motions to strike are DENIED as moot. (04-1249 Doc #154)  
7 (04-1403 Doc #74) (04-1818 Doc #55). Subramanian and Vedatech's  
8 motion for further oral argument are DENIED as moot. (04-1249 Doc  
9 #112) (04-1403 Doc #63) (04-1818 Doc #43). Finally, Subramanian  
10 and Vedatech's request to remain an e-filer in 04-1403 is DENIED as  
11 moot.

12 The clerk shall administratively close the file. This  
13 does not represent a final adjudication but an administrative  
14 convenience for the court. Upon receipt of the state court's order  
15 resolving the insurance bad faith claim in the state court, the  
16 clerk shall re-open the file upon a request of one of the parties.

17  
18  
19 IT IS SO ORDERED.

20  
21 

22 VAUGHN R WALKER

23 United States District Chief Judge  
24  
25  
26  
27  
28



**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**JUL 19 2007**

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY and UNITED  
STATES FIDELITY AND GUARANTY  
COMPANY,

Plaintiffs- Appellees,

v.

VEDATECH INTERNATIONAL, INC., et  
al.

Defendants- Appellants.

No. 05-16255

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

D.C.No. CV-04-01403-VRW

MEMORANDUM\*

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY and UNITED  
STATES FIDELITY AND GUARANTY  
COMPANY,

Plaintiffs- Appellees,

v.

VEDATECH INTERNATIONAL, INC., et  
al

Defendants- Appellants.

No. 05-16261

D.C.No. CV-04-01818-VRW

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\*This disposition is not appropriate for publication and may not be cited to  
or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

VEDATECH INC., VEDATECH K.K., and  
MANI SUBRAMANIAN,

Plaintiffs-Appellants,

v.

ST. PAUL FIRE AND MARINE  
INSURANCE COMPANY, UNITED  
STATES FIDELITY AND GUARANTEE  
COMPANY, QAD INC., QAD JAPAN  
K.K., and RANDALL WULFF,

Defendants-Appellees.

No. 05-16405

D.C.No. CV-04-01249-VRW

Appeal from the United States District Court  
for the Northern District of California  
Vaughn R. Walker, District Judge, Presiding  
Argued and Submitted May 16, 2007  
San Francisco, California

Before: B. FLETCHER, SILER, \*\* and HAWKINS, Circuit Judges.

This is a consolidated appeal that began as a state court insurance coverage action that was twice removed to federal court. Vedatech International Inc., Vedatech Inc., Vedatech K.K. and *pro se* defendant Mani Subramanian (collectively “Appellants”) appeal the district court’s remand orders, its order granting attorneys’ fees to St. Paul Fire & Marine Insurance Company (“St. Paul”), its order sanctioning

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\*\*The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Appellants' attorney and Subramanian, and its dismissal of Appellants' claims that arose from a mediation among the parties. We affirm.

**1. Standard of Review for Remand Orders**

Appellants argue that the Ninth Circuit should employ a good faith analysis when reviewing remand orders. *See, e.g., Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997). However, the Supreme Court has held that "remands based on grounds specified in § 1447(c) are immune from review." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). The district court remanded because no federal question existed, which is a ground enumerated in § 1447(c). Therefore, Appellants' argument is without merit.

**2. Attorneys' Fees**

The district court has discretion to order attorneys' fees for an improperly removed case, and it did not abuse that discretion here. *See Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). Notably, Appellants' central argument in favor of removal of district court cases 04-1818 and 04-1403 was fully adjudicated in the district court and in this court in earlier proceedings related to district court cases 04-1035 and 04-1806.

**3. Sanctions for Second Notice of Removal**

“The imposition of Rule 11 sanctions . . . requires only a showing of objectively unreasonable conduct.” *In re DeVille*, 361 F.3d 539, 548 (9th Cir. 2004). Here, Appellants’ conduct was objectively unreasonable, as they filed the second notice of removal before the first notice of removal had been adjudicated and, thus, at a time when the court lacked any ability to act on the notice at all. *See* 28 U.S.C. § 1446(d). The removal they filed was hundreds of pages in length and did nothing more than duplicate arguments from the initial removal.

#### **4. Retrospective Rule 11 Motions**

Appellants argue that it was impermissible for the district court to invite St. Paul to file Rule 11 motions. Rule 11(c)(1)(B) allows the court to initiate sanctions on its own; therefore, the district court did not err by inviting the filing of motions for sanctions.

#### **5. Colorado River Stay**

The district court declined to adjudicate Appellants’ insurance bad faith claim under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), because essentially the same claims were pending in state and federal court. All the parties, issues, and governing law are the same in both suits. The state court obtained jurisdiction two years prior to the federal court. Certainly, the state court could adequately protect Appellants’ rights. The district court properly determined

that a stay was appropriate. *See Holder v. Holder*, 305 F.3d 854, 863 (9th Cir. 2002); *Martinez v. Newport Beach City*, 125 F.3d 777, 785 (9th Cir. 1997).

#### **6. Injunctive and Declaratory Relief**

The district court correctly rejected the Appellants' claim for injunctive relief as no cause of action existed under California law. *See Major v. Miraverde Homeowners Ass'n, Inc.*, 7 Cal. App. 4th 618, 623 (1992). Because the requests for declaratory relief are all related to the contractual rights at issue before the state court, it was within the district court's discretion to decline the parties' requests. *See Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995).

#### **7. State Tort Law Claims**

The district court correctly dismissed Appellants' fraud and negligent misrepresentation claims against St. Paul and mediator Randall Wulff, as well as Appellants' constructive fraud, conspiracy to commit fraud, and unfair competition claims against QAD. As to the three fraud-related claims, the district court correctly found no causal connection between the fraud alleged and any "harm" allegedly sustained by Appellants. *Wilkins v. Nat'l Broadcasting Co.*, 71 Cal. App. 4th 1066, 1081 (1999) (noting that "resulting damages" must be alleged to make out cause of action for fraud); *Hurvitz v. St. Paul Fire & Marine Ins., Inc.*, 109 Cal. App. 4th 918, 929-30 (2003) (holding that insurer may settle claims on insured's behalf without

insured's consent at least where the insurance policy does not provide otherwise).<sup>1</sup>

As to the negligent misrepresentation claims, the district court correctly found that the misrepresentation complained of by Appellants—i.e., that St. Paul and Wulff never told Appellants that Wulff was a “biased” mediator who had worked with St. Paul before—was an *omission*, not an affirmative misstatement, and that California negligent misrepresentation law covers only the latter. *See Vega v. Jones, Day, Reavis & Pogue*, 121 Cal. App. 4th 282, 290 (2004). As to the unfair competition claim, the district court correctly found that the relief Appellants requested—i.e., “restitution” of the \$500,000 QAD received as a result of the settlement—is unavailable to Appellants under California law. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003) (holding that plaintiff cannot recover damages under Cal. Bus. & Prof. Code § 17200 unless plaintiff has “an ownership interest in the money it seeks to recover”).

#### **8. Leave to Amend**

The district court did not abuse its discretion by dismissing Vedatech's first amended complaint without leave to amend. Appellants filed an initial complaint to

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<sup>1</sup>The district court also correctly found that the constructive fraud claim against QAD should be dismissed because that claim can only be sustained against *fiduciaries*, and QAD stood in an *adversarial*, rather than a fiduciary, position with respect to Appellants. *See Tyler v. Children's Home Soc'y*, 29 Cal. App. 4th 511, 548 (1994).

which St. Paul and the QAD parties responded. Appellants then filed the first amended complaint. “The district court’s discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.” *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).

#### **9. Section 1927 Sanctions**

28 U.S.C. § 1927 provides that “[a]ny attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.” Given the district court’s first hand perspective on the numerous motions for extensions of time and errata briefs filed by Appellants, along with Subramanian’s own admission that his filings against the mediator “were incomplete and inaccurate,” the district court did not abuse its discretion in imposing sanctions under § 1927. *Cf. Grid Systems Corp. v. John Fluke Mfg. Co., Inc.*, 41 F.3d 1318, 1319 (9th Cir. 1994).

#### **10. Private Mediator Immunity**

As this is a diversity action, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), requires the application of California law. California law affords quasi-judicial immunity to people who “fulfill quasi-judicial functions intimately related to the judicial process.” *Howard v. Drapkin*, 222 Cal. App. 3d 843, 847 (1990); *see also*

*Asmus v. Pac. Bell*, 23 Cal. 4th 1, 6 (2000) (indicating that decisions from both the California Supreme Court *and* the California Court of Appeal are “controlling precedent” for federal courts in diversity cases); *Great W. Shows, Inc. v. L.A. County*, 229 F.3d 1258, 1259 (9th Cir. 2000) (same). A mediator, such as Randall Wulff, “fulfilling a quasi-judicial function intimately related to the judicial process” qualifies for such immunity. *Id.* at 854.

#### **11. Private Mediator Sanctions under Rule 11**

Wulff described himself as a “court-appointed” mediator throughout his motion to dismiss. This was not a bad faith misrepresentation. Appellants offer no compelling argument why someone who was a court-appointed mediator could not refer to himself as such in court documents. The district court did not err in refusing to impose Rule 11 sanctions against Wulff. *See Moore v. Local Union 569 of Int’l Bhd. of Elec. Workers*, 989 F.2d 1534, 1546 (9th Cir. 1993).

#### **12. Recusal**

Appellants’ argument that the district judge should have recused himself is meritless. “[I]n the absence of some extrajudicial source of bias or impartiality,” statements made by a judge during the course of trial or in an opinion are insufficient to support a recusal challenge. *United States v. Martin*, 278 F.3d 988, 1005 (9th Cir. 2002). Here, Appellants accused the district judge of bias only *after* learning of his



unfavorable ruling, and they base their challenge on that opinion. This is not enough to demonstrate bias or impartiality.

**AFFIRMED.**

CHRISTINA GONZAGA (CSBN # 221187)  
LAW OFFICES OF JAMES S. KNOPF  
1840 Gateway Drive, Suite 200  
San Mateo, CA 94404  
Telephone: (650) 627-9595  
Facsimile: (888) 715-9583

Attorney for Plaintiffs  
VEDATECH K.K. and VEDATECH INC.

MANI SUBRAMANIAN (PRO PER)  
c/o LAW OFFICES OF JAMES S. KNOPF  
1840 Gateway Drive, Suite 200, San Mateo, CA 94404  
Telephone: (650) 627-9595  
Facsimile: (888) 715-9583

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
(San Francisco Division)

VEDATECH INC., a Washington State  
Corporation, *and* VEDATECH K.K., a  
Japanese Corporation, *and* MANI  
SUBRAMANIAN, an Individual;

Plaintiffs,

vs.

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY,  
a Minnesota Corporation, *and*  
UNITED STATES FIDELITY AND  
GUARANTY COMPANY,  
a Maryland Corporation; *and*  
QAD INC., a Delaware Corporation; *and*  
QAD Japan K.K., a Japanese Corporation;  
*and*  
RANDALL WULFF, an individual;  
*and* DOES 1-50;

Defendants.

Case No.: **C-04-01249 VRW**

**FIRST AMENDED COMPLAINT**  
**of Plaintiffs**

**VEDATECH INC., VEDATECH K.K. and  
MANI SUBRAMANIAN for**

- 1. DECLARATORY JUDGMENT;**
  - 2. PERMANENT INJUNCTION;**
  - 3. FRAUD / MISREPRESENTATION;  
CONSPIRACY TO COMMIT FRAUD;**
  - 4. CONSTRUCTIVE FRAUD;  
CONSPIRACY TO COMMIT FRAUD;**
  - 5. NEGLIGENT  
MISREPRESENTATION;**
  - 6. INSURANCE BAD FAITH (BREACH  
OF COVENANT OF GOOD FAITH  
AND FAIR DEALING)**
  - 7. UNFAIR COMPETITION;**
- and**

**DEMAND FOR JURY TRIAL**

1 Plaintiffs VEDATECH INC., VEDATECH, K.K., and MANI SUBRAMANIAN  
2 allege as follows:

3 **JURISDICTION**

4 1. This court has jurisdiction under 28 USC §1332 (a)(3) ("citizens of different  
5 States and in which citizens or subjects of a foreign state are additional parties" – please see  
6 the section titled "THE PARTIES" in the next page.)

7 2. The amount in controversy exceeds US\$ 75,000.

8 **VENUE AND INTRADISTRICT ASSIGNMENT (SAN FRANCISCO)**

9 3. Venue is proper in the Northern District of California as required under the  
10 provisions of 28 USC § 1391 and according to the Northern District's Civil L-R 3-2.

11 4. Defendant St.Paul Fire and Marine Insurance Co. is a resident of, and  
12 maintains offices (its Regional Claims office) in, San Francisco County at 100 California  
13 Street, Suite 300, San Francisco, California 94111.

14 5. Defendant United States Fidelity and Guaranty Co., a wholly owned and  
15 controlled subsidiary of defendant St.Paul Fire and Marine Insurance Co., is a resident of,  
16 and maintains offices in San Francisco County at One Market Plaza, Ste., 2075 San  
17 Francisco, CA 94105.

18 6. Defendants QAD Inc. and QAD Japan K.K. are subject to personal  
19 jurisdiction in the County of San Francisco.

20 7. Randall Wulff, a key player in the events relevant herein is a resident of  
21 Piedmont, California in Alameda County.

22 8. A substantial part of the events that give rise to the Claims occurred in  
23 Alameda County, California. In addition, most or all of the negotiations regarding the  
24 "agreement" attached as Exhibit-A and the subject matter of this complaint, were undertaken  
25 by Mr. Tancredy of St.Paul from its Oakland offices in Alameda County.  
26

27 Page 2 of 49

28 **First Amended Complaint of**  
Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants  
St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff

**THE PARTIES**

**[Plaintiff] SUBRAMANIAN**

9. Individual Plaintiff Mani Subramanian ("SUBRAMANIAN") is a United States Citizen and is a resident of and domiciled in Seattle, Washington.

**[Plaintiff] VEDATECH INC.**

10. Plaintiff Vedatech Inc., ("VEDATECH-USA") is a Washington State corporation with principal place of business in Seattle, Washington.

**[Plaintiff] VEDATECH K.K.**

11. Plaintiff Vedatech K.K., ("VEDATECH-JAPAN"), is a corporation organized under the laws of Japan with its principal place of business in Yokohama, Japan.

**[Defendant] ST.PAUL FIRE & MARINE INSURANCE CO.**

12. Defendant St.Paul Fire & Marine Insurance Co., ("ST.PAUL") is a Minnesota corporation with principal place of business in Minneapolis (Saint Paul), Minnesota.

**[Defendant] UNITED STATES FIDELITY & GUARANTY CO.**

13. Defendant Unites States Fidelity and Guaranty Co. (USF&G) is a Maryland Corporation with its principal place of business in Baltimore, Maryland.

**[Defendant] QAD INC.**

14. Defendant QAD Inc. ("QAD"), is a Delaware corporation, with its principal place of business in Carpinteria, California. QAD is an alter ego of each and every one of its subsidiaries including QAD Japan K.K., a defendant in this action, and QAD Japan Inc., a Delaware corporation founded solely to strip QAD Japan K.K. of its assets and value.

**[Defendant] QAD JAPAN K.K.**

15. Defendant QAD Japan K.K. ("QAD-JAPAN") is a Japanese corporation which used to have its principal place of business in Yokohama, Japan. In or around August

**First Amended Complaint of**

**Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff**

1 1997, QAD Inc. set up a parallel Delaware corporation called QAD Japan Inc., solely for the  
2 purpose of usurping all of the business, customers, and capital value of QAD Japan K.K.,  
3 reducing the value of Plaintiff Subramanian's share of the issued stock of QAD Japan K.K.  
4 to a minimum or nothing, and rendering QAD Japan K.K. a defunct company. This much,  
5 QAD Inc. has achieved with great success. In addition, QAD Inc. improperly concealed the  
6 existence of QAD Japan Inc., the new company from the public in its SEC offerings. QAD  
7 Inc. went public in August of 1997. The 10-K registrations of QAD Inc., (NASDAQ:  
8 QADI), filed on April 29, 1998, lists only QAD Japan K.K. as a subsidiary of QAD Inc. The  
9 April 28, 2000 filing of QAD Inc. with the SEC lists both QAD Japan K.K. and the new  
10 company QAD Japan Inc. as subsidiaries. Since then, the April 27, 2001, April 30, 2002,  
11 April 30, 2003, and April 15, 2004 10-K registrations with the SEC only show QAD Japan  
12 Inc., the new company as a subsidiary of QAD Japan K.K. QAD Japan K.K. as such does  
13 not have a separate existence apart from QAD Inc., and to the extent it does, it is an "alter  
14 ego" of QAD Inc. To hold otherwise would cause great injustice to Plaintiffs.

15 16. Valerie Miller ("MILLER") is an individual residing in or near Santa Barbara,  
16 California. MILLER serves as Vice President and Corporate Controller of QAD Inc.  
17 MILLER works at the offices of QAD Inc. in or near Carpinteria, California. MILLER also  
18 signs official documents as an officer of QAD Japan K.K. For example, MILLER signed the  
19 "Settlement Agreement" that is at issue in this case and attached herewith as Exhibit A. The  
20 exact liability of MILLER, if any, with respect to these events is not known at this time. If  
21 such liability becomes known, Plaintiffs will join MILLER to the action at the right time.

22 **RANDALL WULFF**

23 17. Randall Wulff ("WULFF") is an individual residing in Piedmont (Oakland),  
24 in Alameda County, California. WULFF conducts business as a "mediator" and works out  
25 of offices in Oakland, Alameda County, California.

1                   **DOE DEFENDANTS**

2           18.     The identity of the DOE defendants 1-50 are unknown or not determinable  
3 with certainty at this point in time. Plaintiffs wish to amend the Complaint later as necessary  
4 as such defendants are identified. From information and belief, such DOE defendants are  
5 responsible for some or all of the causes of action set out herein. The term Defendants or  
6 DEFENDANTS shall refer to the named defendants and the DOE defendants collectively.

7  
8                   **NOMENCLATURE**

9           19.     Defendants ST.PAUL and USFG shall be referred to individually and jointly  
10 as "ST.PAUL" with distinctions made between the two if and when necessary.

11           20.     Defendants QAD and QAD-JAPAN shall be referred to individually and  
12 jointly as "QAD" with distinctions made between the two if and when necessary.

13           21.     Defendants VEDATECH-USA and VEDATECH-JAPAN shall be referred to  
14 individually and jointly as "VEDATECH" with distinctions made between the two if and  
15 when necessary.

16           22.     VEDATECH and defendants SUBRAMANIAN shall be collectively referred  
17 to as the "VEDATECH PARTIES" or "Vedatech Parties".

18  
19                   **PRELIMINARY NOTE**

20           23.     Since the filing of the original Complaint, Plaintiffs have come across a web  
21 article attached as Exhibit B to this Complaint, which provides support for Plaintiffs' claims  
22 herein. This article appeared in the website of an insurance research organization in Dallas in  
23 March 2004. The issues that are in dispute in this instant case raise difficult issues of  
24 developing areas of law. It is Plaintiffs' contention that carriers such as St.Paul are abusing  
25 the process of mediation to engage in pre-meditated acts of bad faith under the cloak of  
26 confidentiality provided by such mediation. These practices need to be stopped.

Page 5 of 49

27  
28                   **First Amended Complaint of**  
Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants  
St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff

## FACTUAL BACKGROUND<sup>1</sup>

### The QAD-Case

24. Litigation in California was initiated by QAD against VEDATECH-USA and SUBRAMANIAN in January 1998. This followed several months of efforts by various parties affiliated with QAD, and eventually QAD itself, to improperly terminate QAD's contractual obligations to Vedatech Parties. This case, originally filed in State Court in San Jose as CV 771638 is now pending in this district as C-04-01806. This case, C-04-01806, shall be referred to herein as the "QAD-Case".<sup>2</sup>

25. The Complaint in the QAD Case, apart for some non-controversial background information, is a long list of fabrications. This was a naked attempt by QAD to put financial pressure on Vedatech Parties and thus force them to abandon their claims which might have been brought more economically in Japan. An accurate description of the background events is set out in great detail in the Third Amended Complaint of VEDATECH-JAPAN in the companion case, currently available as Tab-90 of Exhibit B to the Notice of Removal (Docket #1) in C-04-01806.

<sup>1</sup> ST.PAUL has objected to the original Complaint on the basis that the Complaint did not have enough details (mostly referring to the State procedural rules for pleadings). Conversely, QAD has objected to the same Complaint on the basis that the Complaint had too many details. QAD has suggested that the Complaint be dismissed under FRCP 41(b) for not being concise enough. This First Amended Complaint attempts to comply with the heightened requirements for pleading Fraud under FRCP 9(b). The amount of detail is provided in the hope of discouraging QAD and St.Paul from filing further meritless 12(b)(6) motions claiming a failure to state a claim.

<sup>2</sup> VEDATECH-JAPAN intervened in the QAD-Case by means of a second action, CV 784685 that has been consolidated into CV 771638 for all purposes. Thus, there is only one consolidated case extant. This was last removed to Federal Court as C-04-01806. QAD has filed a motion to remand and a hearing is currently set for July 7, 2004.

**Involvement of insurers, ST.PAUL**

26. In January 1999, Vedatech Parties tendered defense of the QAD-Case to ST.PAUL. Rather than provide a proper defense to the in the QAD-Case, insurers ST.PAUL engaged in a whole series of insurance bad faith acts against Vedatech Parties, weakening their position vis-à-vis QAD considerably.

**Crisis time in the QAD Litigation**

27. In February 2002, independent attorneys hired directly by Vedatech Parties to defend the QAD-Case gave notice that they will quit for non-reimbursement (and non-likelihood of future reimbursements) of various attorney's fees from ST.PAUL.

**The ST.PAUL-Case**

28. If February 2002, ST.PAUL, in an attempt to escape their contractual obligations and to take advantage of the developing situation where it seemed that Vedatech Parties would be left without legal help, purported to rescind their insurance obligations by initiating a Declaratory Action in State Court in San Jose as CV 805197.

29. A full account of the bad faith actions of St.Paul in leading up to their Declaratory Action is described in the Fourth Amended Cross-Complaint of Vedatech Parties (who are defendants therein) as Tab-37, Docket #5, Exhibits (Parts 9-10) to the Notice of Removal, in C-04-01818. C-04-01818 shall be referred to herein as the ST.PAUL-Case.<sup>3</sup>

**ST.PAUL's acts of insurance bad faith continued even after the filing of the counterclaims (cross-complaint) by Vedatech Parties in June 2002**

30. In spite of the fact that Vedatech Parties filed their counterclaims in June 2002 in the ST.PAUL-Case, and detailed their grievances therein, ST.PAUL continued to deny proper defense benefits, did not appoint any defense counsel for the QAD Case, and

<sup>3</sup> The ST.PAUL-Case, CV 805197 was also removed recently to this district as C-04-01403, and on additional evidence as C-04-01818. ST.PAUL has filed motions to remand.



provided sporadic, late, and partial reimbursements for some of the fees incurred by Vedatech Parties' independent counsel. In addition, ST.PAUL intentionally and falsely portrays its bad faith efforts in public documents (such as in filings in this case) as if it is or was providing a full defense in the QAD Case.

**SUBRAMANIAN forced to appear *pro se***

31. Since June 2002, Vedatech Parties have been struggling to maintain their defense of both the QAD-Case and the ST.PAUL-Case. As a result of the poor reimbursement policies of ST.PAUL, SUBRAMANIAN has been forced to appear *pro se*. This has played into QAD's strategy of stonewalling and denying proper discovery.<sup>4</sup>

**ST.PAUL's request for a status report**

32. In November 2003, in response to a request from ST.PAUL for a recommendation with respect to ADR / Mediation, Vedatech Parties suggested mediation with a view to a Global settlement, and floated two names Randall Wulff (WULFF) and Jack Williams as mediators that they had heard about. Vedatech Parties at that point in time were not aware of the prior relationship between ST.PAUL and WULFF. ST.PAUL did not respond substantively to this report. In fact, ST.PAUL, in spite of their duties to disclose the conflict they had with WULFF, failed to disclose their prior contacts with WULFF.

**The January 13, 2004 hearing**

33. On January 13, 2004, ST.PAUL lost its last attempt to dismiss Vedatech Parties' counterclaims in the ST.PAUL-Case. Before the hearing, ST.PAUL, without informing Vedatech Parties and outside their presence, discussed the matter of mediation

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<sup>4</sup> QAD refuses to provide even a copy of their CGL policies that might cover Vedatech's (counter-)claims against them in the QAD-Case. In addition, email archives have been withheld entirely by QAD, who are plaintiffs in a case they themselves chose to bring in California, on the basis that it is "oppressive", etc., etc. ST.PAUL's lack of proper defense support has assisted QAD in getting away with this for this long.

1 with QAD. ST.PAUL then requested the Judge to "order" mediation *specifically* before  
2 WULFF. ST.PAUL did not disclose to the Vedatech Parties or to the Court, the detailed  
3 nature of its prior relationship with WULFF either before or after this hearing.

4 **Pre-meditated plan of ST.PAUL regarding the mediation**

5 34. In addition, ST.PAUL had before the time of this January 13, 2004 hearing,  
6 already formulated a strategy for using the secrecy of mediation as a cover for engaging in  
7 collusive and bad faith negotiations with QAD, and specifically with the help of WULFF, in  
8 order to weaken the legal representation of Vedatech Parties and enhance their own position  
9 in the insurance coverage litigation.

10 35. Prior to the January 13, 2004 hearing, QAD had not made any open settlement  
11 offers to ST.PAUL. Neither had ST.PAUL requested QAD (or the Vedatech Parties) to  
12 make an offer. ST.PAUL itself had not made any offers to QAD. ST.PAUL knew that any  
13 efforts by them to have open settlement discussions with QAD and conduct discussions  
14 would be subject to approval of the Vedatech Parties. ST.PAUL knew fully well that they  
15 had to give Vedatech Parties an opportunity to choose to undertake their own defense. But  
16 this would defeat ST.PAUL's goal of freely being able to pursue their coverage litigation.  
17 Thus, ST.PAUL concocted this plan to arrange a mediation with the specific intent of  
18 engaging in bad faith tactics which they otherwise would not be able to engage in.

18 **Prior business dealings between WULFF and ST.PAUL**

19 36. ST.PAUL and its attorneys had conducted prior business with WULFF  
20 wherein both ST.PAUL and WULFF knew of the advantages of using the cloak of secrecy  
21 provided by the mediation in order to strike deals with the plaintiffs in the underlying cases  
22 (such as the QAD-Case) to the detriment of the insureds. ST.PAUL and Mr. Greenan did not  
23 disclose the details of ST.PAUL's and/or his firm's prior dealings with WULFF. Instead,  
24 before the January 13, 2004 order was made, ST.PAUL made brief general statements of  
25 confidence in the ability of WULFF that failed to describe the close relationship and  
26 understanding they had with WULFF regarding the conduct of insurance mediations.

28 **First Amended Complaint of**

**Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants**  
**St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff**

**Vedatech Parties tricked into “consenting” to mediation before WULFF**

37. Vedatech Parties were unaware of the nature and extent of ST.PAUL’s prior relationship with WULFF, and unaware of ST.PAUL’s plans on using the mediation as a mechanism to safely (for ST.PAUL) engage in bad faith activities. Accordingly, Vedatech Parties did not object to a mediation at the January 13, 2004 hearing. Vedatech Parties made a reasonable assumption that it would be useful to mediate with QAD, and that ST.PAUL would not, for the purpose of the mediation, mix-up the coverage issues with the underlying liability issues in the QAD litigation. Had Vedatech Parties been aware either of

- (a) the conflict that WULFF had because of a close working relationship with ST.PAUL and/or Mr Greenan on similar insurance related mediation; *or*
- (b) the detailed nature of the prior relationship between ST.PAUL and WULFF; *or*
- (c) the detailed nature of the prior relationship between Mr Greenan and his firm with WULFF and the types of mediation they had conducted before; *or*
- (d) ST.PAUL’s premeditated plans regarding the improper use of the mediation, *or*
- (e) ST.PAUL’s premeditated plans of using the attorneys litigating the coverage issues (Mr Greenan, Mr Wang, et. al.) to “negotiate” with QAD and participate in the settlement of the QAD-Case,

they would not even have provisionally consented to this “Order”, or the mediation.

38. In any event, as decided on January 13, 2004, the mediation was contingent and conditional upon the consent and stipulation of all the parties. For example, Arthur Andersen LLP (not a party to this case) did not consent to the proposed mediation, but the order that was prepared by ST.PAUL did not incorporate this condition.

**ST.PAUL handles mediation issues through the coverage attorneys**

39. ST.PAUL moved quickly to arrange mediation. This was done through its attorneys, Mr Greenan and Mr Wang, the same attorneys who were handling the coverage issues (i.e., prosecuting the Declaratory Relief action and defending Vedatech’s bad faith action /counterclaims). The mediation was thus tainted from the beginning.

**First Amended Complaint of**

Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff

1           **ST.PAUL's desperate attempts to force the mediation to happen**

2           40. ST.PAUL and WULFF tentatively set the mediation for March 3, 2004. In  
3 early February 2004, SUBRAMANIAN had to attend to a family emergency. This prevented  
4 him from attending on March 3, 2004, a date selected by ST.PAUL. In response, ST.PAUL  
5 filed an *ex parte* motion in the State Court. ST.PAUL obtained an order forcing  
6 SUBRAMANIAN to personally appear for the mediation on the March 3, 2004 date or face  
7 "contempt of Court".<sup>5</sup> One of the grounds for such a request was the convenience of  
8 WULFF and his non-availability until May 2003. ST.PAUL would not consider anyone  
9 except WULFF as a mediator. This was not the first time that ST.PAUL would get an  
10 erroneous order signed at the hearing itself. Due to ST.PAUL's practices of this nature, the  
11 State Court changed its policy with respect to this case, and began writing out its own orders.

12           **Attempts by WULFF to "make it happen"**

13           41. Initially WULFF did not respond to calls from SUBRAMANIAN and his  
14 requests to change the mediation date. The assistant to WULFF informed SUBRAMANIAN  
15 that he and WULFF only dealt with attorneys and not with *pro se* parties. SUBRAMANIAN  
16 intensified his efforts to alert all parties concerned about the difficulties he had in attending  
17 the March 3, 2004 date. Subsequently, WULFF called SUBRAMANIAN and offered to  
18 reschedule the mediation date for March 12, 2004. WULFF did this as a favor to ST.PAUL  
19 (in order to ensure that ST.PAUL had the forum to engage in their pre-planned collusive  
20 activities with QAD and bad faith tactics to threat SUBRAMANIAN).

21  
22 <sup>5</sup> ST.PAUL repeated this kind of extreme behaviour when it gave notice  
23 of an *ex parte* hearing for March 15, 2004 ostensibly for resolution of its  
24 discovery dispute asking VEDATECH to produce all the discovery documents  
25 disclosed by QAD in the underlying litigation. When SUBRAMANIAN appeared  
26 for the hearing, Mr. Wang, an attorney for ST.PAUL, seconds before  
27 entering the chambers gave SUBRAMANIAN papers in support of a "contempt  
28 citation". Of course, the Court did not issue any such contempt citation.

**WULFF and the "Confidentiality Agreement"**

42. In the way of preparation for mediation, on or around February 3, 2004, Michael Richards, assistant to WULFF sent copies of a fee schedules and a "CONFIDENTIALITY AGREEMENT". This document purported to be a proposed agreement between the various parties to the mediation and WULFF, the mediator.

**Vedatech Parties decline offer regarding multilateral agreements**

43. SUBRAMANIAN refused to sign any further agreements with the parties just for the sake of engaging in the mediation process, especially given the multiplicity of disputes already ongoing between the parties. SUBRAMANIAN was willing to consider a separate limited bilateral agreement with the mediator as necessary and appropriate.

**Conference Call conducted by WULFF**

44. The issue of the lack of consent of Arthur Andersen to the January 13, 2004 "consent" order came before the State Court again in February 2004. This resulted in the State Court deciding that the mediator should set the terms of the mediation. In a telephone conference call organized by WULFF in response to this, SUBRAMANIAN made clear the objection of Vedatech Parties to signing the Confidentiality Agreement or any sort of agreement with the parties. Mr Greenan, attorney for ST.PAUL (in the coverage action) was also participating in the conference call. He immediately said that this would be a "problem". ST.PAUL and Mr Greenan did not disclose to Vedatech Parties the real reason why this was a "problem". ST.PAUL and Mr Greenan then proceeded to put pressure on SUBRAMANIAN to sign the CONFIDENTIALITY AGREEMENT. ST.PAUL and Mr Greenan insisted on extended agreements on confidentiality with respect to the mediation.

**WULFF requests a Court Order**

45. WULFF, at this conference call decided that the arrangements discussed at the conference call should be turned into an Order of the State Court. Arthur Andersen prepared a draft that was found unacceptable by Vedatech Parties. ST.PAUL put pressure on Arthur Andersen to submit that draft urgently to the State Court.

**Further desperate and extreme measures adopted by ST.PAUL**

46. SUBRAMANIAN and VEDATECH had rejected this proposed Order prepared by Andersen. ST.PAUL and QAD, yet again without notice and at a hearing on a different matter, persuaded the State Court Judge to sign the order setting various details of the mediation, including portions of a contract originally offered by the mediator and which SUBRAMANIAN had rejected. The State Court Judge signed this coercive order on the basis that the January 13, 2004 order was by "consent". The "consent" of Vedatech Parties to the January 13, 2004 was obtained through fraudulent non-disclosure by ST.PAUL.

**SUBRAMANIAN forced to attend the March 12, 2004 mediation**

47. The net effect of all of this was that SUBRAMANIAN, although not desirous of participating in any mediation under these coercive conditions, was under a Court order (obtained fraudulently by ST.PAUL) to participate in the mediation on March 12, 2004. This mediation had been carefully stage-managed by ST.PAUL, and WULFF.

**The proposed agreement with WULFF**

48. A few days before the mediation, SUBRAMANIAN reviewed the draft proposed agreement sent by the mediator, the original "CONFIDENTIALITY AGREEMENT". Upon inquiry with Michael Richards, the assistant to the mediator, Mr Richards informed SUBRAMANIAN's attorneys that the reference to "Confidentiality" in this agreement was to the agreement itself, and that the reference to "Conflicts Check" simply meant that a conflicts check had been completed and that there was no conflict. No reference to the "Mediation Procedures" was made and no such document was received. WULFF's assistant, Mr. Richards did not mention any conflict with ST.PAUL, nor did he provide any information at all about the past relationship WULFF had with ST.PAUL or Mr. Greenan or his law firm. On this basis that WULFF had performed a conflicts check and there was no known conflict with the participants, SUBRAMANIAN proposed a draft revised bilateral agreement and sent that proposal by email to WULFF and Mr Richards. No response was received until the day of the mediation.



## EVENTS BEFORE THE MEDIATION STARTED

49. In light of the uncertainty over the admissibility of evidence of events at the actual mediation itself, Plaintiffs will only detail events before the official start of the mediation (around 11:00 AM) and after the end of the mediation (around 4:00 PM). Further details will be provided if necessary and as the Court permits.<sup>6</sup>

### Coercion and Duress before the commencement of the Mediation

50. On the morning of March 12, 2004 the parties assembled BEFORE the start of the mediation for a discussion of contractual formalities etc. SUBRAMANIAN objected to the participation by the coverage attorneys for ST.PAUL (Mr. James Greenan and Mr. Enoch Wang). This was due to the conflict of interest arising from the coverage issues and the declaratory relief action, wherein ST.PAUL was trying to defeat coverage by taking positions that essentially put them in the same camp as QAD. As a means to avoiding this conflict, SUBRAMANIAN further suggested that the insurance adjuster (Mr Joseph Tancredy) was the appropriate person to participate in the negotiations with QAD.<sup>7</sup> ST.PAUL flatly rejected these offers. Mr Tancredy insisted that Mr Greenan be in charge.

### SUBRAMANIAN attempted to leave before the mediation started

51. SUBRAMANIAN then informed WULFF, that he did not want to start the mediation under these conditions. SUBRAMANIAN expressed his decision to leave before the mediation started. After strong pressure and further promises from WULFF detailed

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<sup>6</sup> This clarification is provided to avoid unnecessary objections by QAD or ST.PAUL regarding the pleading of confidential matters.

<sup>7</sup> VEDATECH's motion in State Court in late 2003 to have the insurance coverage litigation stayed pending the resolution of the QAD case was denied. Because of the financial troubles caused by the lack of proper funding from ST.PAUL, no writ application has been filed yet although Vedatech Parties wish to make such an appeal.



1 herein, SUBRAMANIAN agreed to stay back for limited purposes only. One of the  
2 conditions for SUBRAMANIAN's continued participation was that SUBRAMANIAN  
3 should first be able to attempt mediation with QAD alone and then have the option of  
4 terminating the mediation. SUBRAMANIAN also told WULFF that Vedatech Parties would  
5 consider the entire mediation to be over if SUBRAMANIAN so chose to leave. WULFF  
6 agreed to these conditions.

7 **The bilateral proposed agreement with WULFF**

8 52. At this point, WULFF presented the old CONFIDENTIALITY  
9 AGREEMENT to SUBRAMANIAN for signature and SUBRAMANIAN reminded WULFF  
10 of the email he had sent with the proposed bilateral agreement. WULFF rejected the  
11 proposal made by SUBRAMANIAN and started making several changes to the draft sent by  
12 SUBRAMANIAN. In addition, SUBRAMANIAN explained Mr Richards' prior assurances  
13 about the "conflicts check". Then, for the first time SUBRAMANIAN and VEDATECH  
14 were given a document called "Mediation Procedures", which had buried among other  
15 language the following text, and which SUBRAMANIAN did not notice at that time:

16 "Any past professional acquaintance with counsel o[n] prior matters I have  
17 mediated for any counsel or parties will not be included in any disclosure being  
made; I rely on the parties and counsel to advise one another of this, if appropriate"

18 53. This is made even more egregious because SUBRAMANIAN insisted  
19 unsuccessfully that all terms of the confidentiality agreement should be within that one  
20 document and should not refer to any another document. WULFF insisted on referring to  
21 this separate document titled "CONFLICTS CHECK". In addition, WULFF assured  
22 SUBRAMANIAN that the purpose of this separate page titled "CONFLICTS CHECK" was  
23 to take into consideration the fact that he had worked for a large firm before. WULFF further  
24 stated that this prior firm had many clients that WULFF did not even know anything about,  
25 and it would be impossible for him to do a conflicts check with all such entities that he had  
26 had no contact with or had not represented. At no point during this conversation did WULFF

1 mention that he had worked with ST.PAUL or Mr. Greenan before, nor did he alert  
2 SUBRAMANIAN to the passage in the text (excerpted above) that was outside the scope of  
3 the verbal assurances he was providing SUBRAMANIAN.

4 54. Even at this stage, and especially at this stage, if SUBRAMANIAN had  
5 known that Mr. Greenan or his firm or ST.PAUL had personally conducted prior mediations  
6 of any sort with WULFF, or if ST.PAUL or WULFF had disclosed such matters to him, as  
7 they should have, SUBRAMANIAN would have withdrawn before the start of the mediation.

#### 8 **Duress in signing the bilateral agreement**

9 55. Thus, although SUBRAMANIAN had sent WULFF a draft ahead of the  
10 mediation, WULFF had not reviewed the draft, and at the last minute was making various  
11 changes to it and insisting that the document be signed before he would start the mediation.  
12 On the other hand, WULFF discouraged SUBRAMANIAN from leaving or canceling the  
13 whole mediation, which is what SUBRAMANIAN wanted to do in light of the severe  
14 conflicts of interest posed by ST.PAUL mixing up coverage and settlement issues.

#### 15 **Document not signed by WULFF**

16 56. In light of the various assurances provided by WULFF and on the assumption  
17 that ST.PAUL and/or WULFF would have informed SUBRAMANIAN of any prior contacts,  
18 SUBRAMANIAN signed this revised document titled "CONFIDENTIALITY  
19 AGREEMENT". WULFF did not sign the document.

#### 20 **Failure of discussions with QAD**

21 57. The discussions with QAD eventually failed. At this point, around 4:00 PM,  
22 SUBRAMANIAN informed the mediator that the mediation was formally over and promptly  
23 left. SUBRAMANIAN also explicitly informed the mediator that the mediation was  
24 terminated. Vedatech Parties believe that many of the acts of WULFF, ST.PAUL and QAD  
25 under the rubric of "mediation" are unlawful, unfair and fraudulent. Vedatech Parties will  
26 further detail such activities if the Court permits such evidence to be introduced.

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#### 27 **First Amended Complaint of**

28 **Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants**  
**St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff**

**Continuation of discussions between ST.PAUL and QAD and WULFF**

58. Despite the departure by Vedatech Parties, WULFF continued the discussions with ST.PAUL and QAD and conducted various negotiations, even though the mediation was called off, and even though WULFF was well informed of the conflicts of interest between the two roles of ST.PAUL as insurer and the instigator of coverage disputes.

**WULFF as advocate of ST.PAUL and QAD and against SUBRAMANIAN**

59. In continuing such mediations, WULFF breached his promises to the parties and his duties to be an impartial mediator, and worked with QAD and ST.PAUL in a collusive and conspiratorial manner to the detriment of Vedatech Parties.

**No agreement between ST.PAUL and QAD on Monday, March 15, 2004**

60. On March 15, 2004, SUBRAMANIAN met Mr Enoch Wang, the associate working under Mr Greenan on the coverage issues, at an *ex parte* hearing at the Court. Later, Mr Wang came to the offices of attorneys for VEDATECH to go over documents produced by QAD in the underlying litigation. Mr Wang did not provide any information at all regarding any negotiations or agreement between QAD and ST.PAUL.

**Removal of QAD-Case to Federal Court on March 15, 2004**

61. On March 15, 2004, Vedatech Parties removed the QAD-Case to federal court. Vedatech Parties had assumed that the mediation was called off after they left around 4:00 PM on March 12, 2004. No information to the contrary was received.

**Announcement of secretly concluded "settlement" between QAD and ST.PAUL**

62. On March 16, 2004, ST.PAUL and QAD unsuccessfully attempted to have the QAD claims dismissed so that the removal of the QAD-Case can be defeated.

**Details of this clandestine agreement not provided in spite of repeated requests**

63. On March 16, 2004, Mr Greenan, coverage attorney for ST.PAUL, after repeated requests from SUBRAMANIAN, would only state that no settlement papers had been prepared. On March 18, 2004, Mr Greenan for ST.PAUL, finally relented and stated

1 only that "an agreement in principle was reached with QAD ... the details of the agreement  
2 have not yet been reduced to writing, as the agreement was reached through the mediator."

3 **Confirmation of WULFF's role in the mediation**

4 64. Thus, it was Mr Greenan's email (ST.PAUL) dated March 18, 2004, that first  
5 alerted Plaintiffs to the fact that WULFF was continuing to assist ST.PAUL and QAD even  
6 though SUBRAMANIAN had specifically called off the mediation after discussions with  
7 QAD had failed to produce a negotiated settlement.

8 **NO OPTION TO VEDATECH PARTIES TO TAKE OVER DEFENSE**

9 65. This "settlement" and "agreement and release" was entered into without  
10 allowing Vedatech Parties the option of releasing ST.PAUL from any bad faith claims for not  
11 paying for future defense costs, partial or otherwise, going forward from the time of any such  
12 agreement. Additionally, Vedatech Parties were not given the option of releasing ST.PAUL  
13 from any liability for Judgments in excess of policy limits. Indeed, since even QAD's  
14 unrealistic estimates of damages were themselves much less than the policy limits, this  
15 scenario was improbable if not an impossibility. ST.PAUL always knew that there was no  
16 realistic chance of any Judgment being in excess of the applicable policy limits.

17 **The "agreement" between QAD and ST.PAUL reached on March 25, 2004**

18 66. On March 25, 2004, Mr Wang for ST.PAUL sent a copy of a signed document  
19 attached as Exhibit A of this Complaint (titled "AGREEMENT AND RELEASE") that  
20 purports to be the settlement agreement that St.Paul reached with QAD. It is signed by Karl  
21 Lopker, CEO of QAD Inc., and Valerie Miller, an officer of QAD Inc., for QAD Japan K.K.,  
22 and (on a separate piece of paper) by Mr Joe Tancredy, claims adjuster for ST.PAUL.

23 **Real purpose of this secret "agreement and release"**

24 67. ST.PAUL wishes to escape its obligations regarding its duty to defend  
25 involving the QAD litigation. ST.PAUL also wishes to find excuses for not paying  
26 outstanding legal bills to various attorneys. ST.PAUL also wishes to weaken Vedatech

Parties's legal representation in the coverage litigation. In this coverage litigation, Vedatech Parties have counterclaims for bad faith actions by ST.PAUL at least until the date of Vedatech's answer to the declaratory relief action by ST.PAUL. ST.PAUL also wishes to defeat Federal Jurisdiction which would involve further defense costs regarding copyright and other issues.

**QAD's multi-year effort to weaken Vedatech Parties' legal representation**

68. QAD wishes to weaken Vedatech Parties's legal representation for the affirmative claims. QAD knows that its own claims are meritless and is happy to accept ST.PAUL's monies if it would weaken the position of Vedatech Parties in the overall litigation. QAD has, since 1997 repeatedly tried to interfere with or weaken legal representation for Plaintiffs. These acts involved QAD's internal counsel, Mr Roland Desilets writing a letter to Morrison and Foerster and trying to conflict them out for representing a bank that was *adverse* to QAD! In addition, Mr Desilets made overtures to attorneys at Bogle and Gates after that firm fell apart in 1999, trying to get them not to represent SUBRAMANIAN or VEDATECH anymore. The current "agreement and release" has been intentionally designed by ST.PAUL and QAD, with the unlawful use of the process of mediation and the mediator to harm Plaintiffs for the benefit of ST.PAUL and QAD.

**ST.PAUL now refuses to pay even for past limited defense costs**

69. Predictably, after its secretly obtained "agreement and release" with QAD, ST.PAUL has refused to reimburse for large portions of even the limited defense costs that it had promised to Vedatech Parties in their standstill agreement of July 2002. These non-reimbursed amounts exceed US\$ 200,000. ST.PAUL induced Vedatech Parties to hire attorneys in July 2002 with promises of limited reimbursement. Vedatech Parties would not have attended the mediation if they knew of ST.PAUL's plans to withhold their partial reimbursements for past defense costs. Now that ST.PAUL claims it has "settled" the QAD claims, it feels free to put pressure on Vedatech's attorneys.

**FIRST CAUSE OF ACTION  
(DECLARATORY JUDGMENT)**

70. Vedatech Parties reallege all of the allegations of paragraphs 1-69 above.

**Existence of Controversy**

71. There has arisen between the parties, actual substantial and justiciable controversies over the validity, interpretation, authority to enter into, and other aspects of the purported contractual document in Exhibit A. Specifically, Plaintiffs wish judicial determination of the validity, scope, and interpretation of this "agreement and release" between ST.PAUL and QAD (and which directly affects Plaintiffs' rights). Plaintiffs contend that this "agreement and release" is void, was entered into by ST.PAUL without authority, and was the effort of collusive and unlawful secret negotiations by ST.PAUL.<sup>8</sup>

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<sup>8</sup> Both ST.PAUL and QAD attempt to rely on a California Court of Appeals decision in Hurvitz v St.Paul Fire & Marine Insurance Co., (2003) 109 Cal.App.4<sup>th</sup> 918. That decision cannot in any way support the propositions that ST.PAUL and QAD are advancing. For example, in Hurvitz, supra, p.934, it is clearly explained that:

The Hurvitzes attempted to prevent St. Paul from settling with Dr. Hoefflin, but, notwithstanding their professed expectations of an easy victory, at no time indicated a willingness to give up their right to indemnity from St. Paul if Dr. Hoefflin won a judgment in excess of the proposed settlement. Nor did they agree to give up their right to seek a bad faith recovery against St. Paul if a judgment was obtained against them in excess of policy limits.

In this case, first of all there was no open settlement offer from QAD. The whole process was a secret, collusive bad faith conspiracy by St.Paul and QAD to find a way to benefit themselves at Vedatech Parties' expense. Vedatech was not even informed of a tentative offer or settlement from QAD. The result of an "oral agreement in principle" was "announced" in open Court to the surprise of Vedatech Parties on the morning of March 16, 2004. St.Paul never gave Vedatech Parties a chance to consider such an offer. Vedatech's attempts to raise such possibilities were summarily rejected by ST.PAUL through their coverage attorney Mr. Greenan.

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**First Amended Complaint of**  
Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff



72. Furthermore, ST.PAUL still wishes to continue with the declaratory relief action to try to recover already disbursed costs of defense in the QAD case.

#### **Rescission of the CONFIDENTIALITY AGREEMENT with the mediator**

73. Plaintiffs have rescinded the CONFIDENTIALITY AGREEMENT with WULFF for fraud, misrepresentation, duress, want of execution, lack of acceptance of offer, and for other lawful reasons. Plaintiffs have issued a proper notice of rescission to WULFF. In response, WULFF contests the rescission of this secondary agreement. Plaintiffs seek a Judicial confirmation of the validity the rescission of this secondary agreement.

#### **Statutory basis for Prayer**

74. Plaintiffs base their request for declaratory judgment on Title 28, United States Code § 2201, for the purpose of determining questions of such actual controversies between the parties and as detailed more fully in this Complaint.

#### **The mischief in ST.PAUL's "settlement"**

75. ST.PAUL (and QAD and WULFF) know clearly that QAD's claims, even in the case of a default Judgment cannot result in damages in excess of the policy limits. The policy limits are anywhere between \$2 Million and more than \$12 Million depending on the period of coverage and the inclusion of "umbrella" provisions.

#### **76. WITHOUT THIS "SETTLEMENT":**

- ST.PAUL would still be prevented from proceeding full steam with its "coverage action" because of the conflicts with the QAD-Case.
- The insurance policies in question are not "self-burning" and hence the defense costs are not limited by the policy limits.



- Withholding past defense costs (even on the limited basis that ST.PAUL has been reimbursing them for), would seriously expose ST.PAUL for further bad faith actions in light of interference with an ongoing defense.

77. BUT WITH THIS “SETTLEMENT”:

- ST.PAUL now claims to be free to litigate all of the QAD-related issues in order to try to recover their past defense costs
- ST.PAUL are withholding past defense costs (even on their own limited “standstill agreement,” more than \$200,000,);
- A side-benefit for ST.PAUL is weakening of Vedatech Parties legal representation (by causing financial distress to their attorneys) and thereby improving their position in the coverage litigation;

**There is real damage to Plaintiffs if declaratory relief is not granted**

78. The threatened action by ST.PAUL and QAD, viz., the compromise of QAD’s claims (ostensibly good for Plaintiffs) but on the condition that ST.PAUL will unilaterally exhaust \$500,000 of Plaintiffs’ available insurance limit and still “reserve” their rights to recover that from Plaintiffs is tantamount to a coercive and unlawful foisting of liability on Plaintiffs for which the apparent justification is that the insurance policies provide such a contractual right.

79. Plaintiffs have been denied their rights to choose to pursue their own defense and clear their names [see footnote 9 above regarding the distinction with the *Hurvitz* case.]

80. In addition, ST.PAUL is continuing with its coverage on the basis of “reservation of rights” with respect to various causes of action in the QAD-Case. Plaintiffs will have to re-litigate the exact same issues that are purportedly “released”.

**St.Paul's Purported Authority to Settle QAD's Claims**

81. The Commercial General Liability (CGL) policies of ST.PAUL issued to Vedatech Parties have the following language under the section titled

**COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY**

[...]

[...] We may, at our discretion, investigate any "occurrence" or offense and settle any claim of "suit" that may result."

82. On the other hand, in the coverage litigation (C-04-01818), ST.PAUL pleads rescission of these very same policies. To wit, the Fifth Cause of Action of ST.PAUL is pleaded as follows ("Plaintiffs" in the excerpt below refers to ST.PAUL and "defendants" in the excerpt below to Vedatech Parties):

**FIFTH CAUSE OF ACTION**

**(Declaratory Relief - Rescission [sic])**

[...]

52. Plaintiffs contend that defendants made false representations which were material to the issuance of the insurance policies, that Plaintiffs were unaware these representations were false, and that the policies should accordingly be rescinded and rendered null and void

83. California Civil Code §1691 provides for a party to give a notice of rescission and thus effect the same (i.e. rescission). It also provides that the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice.

84. Since California abolished the equitable action for "rescission" in 1961, it has to be assumed that St.Paul in its Declaratory Action in State Court is asking for various declarations based on its own unilateral election to rescind and the effectiveness of the same, i.e. based on the premise that it has already rescinded the insurance policies.

1           85. Any orders by the Court restoring parties to the position before such rescission  
2 (if it is valid) does not affect the date or effectiveness of rescission, which is the date of  
3 commencement of the coverage litigation, viz., Feb 2002.

4           86. If these insurance policies are “null and void”, and already rescinded, as  
5 ST.PAUL claims, and especially if they are so null and void because of Vedatech’s alleged  
6 pre-contractual misrepresentations, then it would be unlawful for ST.PAUL to depend on null  
7 and void agreements to gain the right to unilaterally, in their “discretion,” to enter into this  
8 “agreement and release” with QAD that affects Vedatech’s substantive rights, with respect to  
9 settlement of claims or otherwise. Furthermore, under California Civil Code §1691,  
10 ST.PAUL’s declaratory suit itself serves as a notice of rescission and thus effects rescission  
11 unless found otherwise by the Court. Thus, until a final Judgment is reached in the insurance  
12 coverage litigation, and the issue and question of, and effectiveness of ST.PAUL’s rescission  
13 is judicially determined, ST.PAUL cannot act inconsistently with its position that the policies  
14 have been rescinded. Thus, ST.PAUL on its own position has acted without authority, or  
15 ST.PAUL is estopped from asserting such authority while at the same time seeking to have  
16 the contracts be declared null and void in its coverage action.

17           87. In addition, the purpose for which ST.PAUL has unlawfully manufactured this  
18 “agreement and release” has to do with gaining advantages in the coverage litigation,  
19 weakening Plaintiffs and helping QAD to indirectly weaken Plaintiffs (provide them funds  
20 for resisting Plaintiffs’ counterclaims / affirmative claims). It would be inequitable for  
21 ST.PAUL to be permitted to proceed in this fashion.

22           88. Plaintiffs would also not be able to clear their names and prove their  
23 innocence in the QAD case. Plaintiffs’ rights to prosecute QAD for malicious prosecution  
24 would be compromised by this “settlement”. Nevertheless, Plaintiffs would be facing  
25 litigation of the very same issues in the coverage case with ST.PAUL.

90. Accordingly, Vedatech Parties respectfully request the Court for one or more of the following declarations or any other declaration in a form determined by the Court, all as the Court deems appropriate:

- a. THAT the purported settlement agreement, “agreement and release” dated March 25, 2004, between QAD and ST.PAUL is null and void, and/or unenforceable.
- b. THAT ST.PAUL had no authority to enter into this “agreement and release” on behalf of VEDATECH and/or SUBRAMANIAN;
- c. That any payment made by ST.PAUL cannot be used to deduct available benefits to Vedatech Parties from any of their policy agreements with ST.PAUL;

- 1 d. THAT any payments ST.PAUL may make is not on behalf of the "Insured or  
2 Putative Insureds" as set out in paragraph 2 of this agreement but is a voluntary  
3 payment undertaken by ST.PAUL for its own benefit;
- 4 e. That ST.PAUL has no right of reimbursement from VEDATECH or  
5 SUBRAMANIAN for the amounts it may pay under this agreement;
- 6 f. That ST.PAUL is not permitted to "reserve" any rights with respect to any  
7 payment under this agreement;
- 8 g. THAT ST.PAUL has acted in bad faith and breached its duties as an insurer to  
9 Vedatech Parties as insureds by collusively and secretly conducting such  
10 negotiations with QAD and by using the cloak of settlement privilege for  
11 unlawful and improper purposes;
- 12 h. THAT ST.PAUL may not use any monies it may pay under the "agreement and  
13 release" as a set-off in any action between Vedatech Parties and ST.PAUL;
- 14 i. THAT ST.PAUL cannot recover such payments even if the policies are null and  
15 void as ST.PAUL claims they are;
- 16 j. THAT all discussions between ST.PAUL and QAD are not subject to any  
17 evidentiary privilege or protection and are discoverable;
- 18 k. THAT all discussions between ST.PAUL and QAD made through or ostensibly  
19 through the mediator are also not subject to any evidentiary privilege of protection  
20 and are discoverable;
- 21 l. THAT ST.PAUL is liable to pay past legal bills due on the same terms and  
22 conditions it has been paying them before this "agreement and release" was  
23 secretly concluded and that ST.PAUL take no efforts to unfairly withhold such  
24 payments under the excuse of having concluded such an agreement;
- 25  
26  
27

- 1 m. THAT ST.PAUL has no rights to "audit" any such bills beyond legal proceedings  
2 for any fault it may think there is or, alternatively, raise such issues in this  
3 litigation or in the underlying coverage litigation;  
4 n. THAT ST.PAUL cannot re-litigate the QAD claims that are purportedly released  
5 in the "agreement and release" in the underlying coverage litigation or otherwise;

6 **With respect to Defendant QAD**

- 7 o. THAT any release "with prejudice" by QAD parties not be referable to this  
8 "agreement and release";  
9 p. THAT any dismissal "with prejudice" of QAD's complaint(s) against any or all of  
10 the Vedatech Parties be final and shall not be affected by any adjudication of the  
11 status or validity or enforceability of the "agreement and release" signed between  
12 ST.PAUL and QAD.  
13 q. THAT to the extent that QAD has released or will release any claims against  
14 VEDATECH or SUBRAMANIAN its only remedies remain against ST.PAUL;  
15 r. THAT, if QAD releases any rights or claims under this agreement, then it may not  
16 raise any issues relating to such rights or claims in any judicial proceedings, as a  
17 defense or for any other purpose and that no setoff of any kind is permissible;  
18 s. THAT QAD, at a minimum, cannot rely upon the settlement evidentiary privilege  
19 for negotiations regarding this "agreement and release", especially after  
20 SUBRAMANIAN terminated the mediation around 4 PM on March 12, 2004;  
21 t. THAT QAD transfer to Vedatech Parties all of the monies it received from  
22 ST.PAUL under this "agreement and release", [either under a theory of Unjust  
23 Enrichment or as a remedy to the Cause of Action for Unfair Competition /  
24 disgorgement of profits as detailed below].  
25

**With respect to Defendants ST.PAUL and QAD**

- u. THAT, in any event, this “agreement and release” not be given effect until the underlying coverage litigation between ST.PAUL and Plaintiffs is finally resolved and all issues regarding the validity of the various policies and rights of the parties under such policies are finally determined by the Courts.

**With respect to Defendant WULFF**

- v. THAT, the “confidentiality agreement” has been properly rescinded.
- w. THAT no evidentiary privilege attaches to any aspect of the “mediation” described herein, especially after its termination by Vedatech Parties around 4:00 PM on March 12, 2004;

**SECOND CAUSE OF ACTION  
(INJUNCTIVE RELIEF)**

91. Vedatech Parties reallege paragraphs 1-90 above.

**Inadequacy of Remedy in Law**

92. Plaintiffs have no adequate or speedy remedy at law for Defendants’ conduct (and threatened conduct) detailed herein, and this action for injunctive relief is Plaintiffs’ only certain means for securing relief.

93. ST.PAUL has already rescinded its own policies (contracts) and if they prevail in their cause of action for “Declaratory Relief – Rescission [sic]” in the underlying coverage case, then Plaintiffs are left with no meaningful remedy in law if, for example, QAD wishes to argue a basis for remand to State Court of C-04-01818 based on dismissal of claims in reliance of this ineffective “agreement and release.”



1           94. ST.PAUL and QAD are clearly colluding to try to defeat Federal Jurisdiction  
2 with respect to the underlying consolidated actions removed from State Court.

3           95. If the claims against Plaintiffs are dismissed but later found to be improperly  
4 dismissed (i.e. without affording Vedatech Parties a chance to clear their names, and the right  
5 to pursue QAD for malicious prosecution, etc.), then the results of any further proceedings  
6 both in the QAD matter and in the insurance matter cannot be reversed.

7           96. Vedatech Parties are being forced to defend these “dismissed” claims in the  
8 context of the Coverage action. There is no real benefit to the insureds at all, which is the  
9 real problem with this “release”.

10           **No Harm to ST.PAUL or QAD**

11           97. ST.PAUL has provided a notice of rescission by filing their suit. There is no  
12 reason for ST.PAUL to have any expectation of being able to exercise any such rescinded  
13 contractual rights. Alternatively, ST.PAUL should be denied any rights to further rescind the  
14 insurance policies, having relied upon them to cause prejudice to Vedatech Parties.

15           98. ST.PAUL has repeatedly referred to their partial reimbursement of defense  
16 costs in the underlying QAD litigation. But that was, and has always been voluntary and  
17 amounts to ST.PAUL’s strategy of implementing a program of self-insurance and mitigation  
18 of damages, *in case* their baseless theories regarding rescission are judicially adjudged to be  
19 wrong. The fact that ST.PAUL was hedging their bets should not be a cause for any  
20 prejudice to Plaintiffs. Indeed, Plaintiffs have not even been given an option of proceeding  
21 with their own defense as an alternative to ST.PAUL entering into such collusive and secret  
22 agreements behind the back of Plaintiffs. QAD still has to defend against Vedatech Parties’  
23 claims. The issues are identical and there is not savings in judicial time or efficiency in  
24 “settling” QAD’s claims. If QAD sincerely considers its claims to be worth \$500,000 or  
25 more, then not involving in this “compromise” exchange cannot harm QAD.  
26



**Injunctive Relief Requested**

99. WHEREFORE, Plaintiffs respectfully request the Court to issue an injunction with respect to one or more of the following imminent acts of Defendants (and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with Defendants), enjoining and restraining Defendants either, permanently and perpetually or until a final Judgment (including appeals) is entered in the underlying insurance Declaratory Relief action commenced by ST.PAUL (C-04-01818). The Court is also requested to order additional injunctions as appropriate:

- a. ST.PAUL to be ordered not to pay any monies directly or indirectly to QAD or related parties under paragraph 2 of the "agreement and release," a copy of which is attached as Exhibit A to this Complaint;
- b. ST.PAUL to be ordered not to pay directly or indirectly any monies to QAD or any other related party at all, wherein such a payment is or can be construed as being on behalf of Plaintiffs (referred to as "Insured and Putative Insureds" in Paragraph 2 of the "agreement and release");
- c. ST.PAUL to be ordered not to pay directly or indirectly any monies to QAD or any other related party at all, wherein such payments create any liability for payments or set-offs of any sort, present or future on the part of Plaintiffs;
- d. ST.PAUL to be ordered to pay past due legal bills without any further delays;
- e. ST.PAUL and QAD be enjoined from trying to enforce this "agreement and release" in this Court or otherwise until the underlying coverage litigation and this action itself is resolved;
- f. ST.PAUL be enjoined from re-litigating the QAD claims in part or whole in the underlying coverage litigation;

- 1 g. ST.PAUL and QAD and WULFF to be ordered to provide full details of all their
- 2 negotiations relating to the "mediation" and the "agreement and release";
- 3 h. QAD be ordered not to bring any proceedings or motions in reliance of this
- 4 "agreement and release";
- 5 i. QAD be ordered not to act in reliance of this agreement in any way whatsoever;
- 6 j. QAD be ordered to produce all insurance policies in the period 1994 through the
- 7 current period, including D&O policies and CGL policies;

#### 8 **Damages**

9 100. As a proximate result of such threatened activities of Defendants, Vedatech  
 10 Parties have sustained damages including various attorney fees and costs and pray that such  
 11 amounts be ordered to be paid to Plaintiffs by Defendants.

12 101. The actual damages to Plaintiffs if Defendants are permitted to pursue their  
 13 threatened actions are in an amount in excess of \$75,000.

### 14 **THIRD CAUSE OF ACTION** 15 **(FRAUD – INTENTIONAL MISREPRESENTATION)**

16 102. Vedatech Parties reallege all of the allegations of paragraphs 1-101 above.

#### 17 **Representations by ST.PAUL regarding purpose of "mediation" and the** 18 **aggressive promotion of WULFF as a mediator**

19 103. ST.PAUL concealed from Plaintiffs the true reasons for their desire to conduct  
 20 a mediation. ST.PAUL's non-disclosure of their pre-meditated plans of using the cloak of  
 21 secrecy surrounding the mediation to engage in insurance bad faith actions is a deliberate  
 22 misrepresentation. Such misrepresentation and non-disclosure was intended by ST.PAUL to  
 23 induce Plaintiffs to consent to such a *faux*-mediation. ST.PAUL obtained Court orders based  
 24 on such fraudulently procured "consent" and then freely conducted their bad faith activities  
 25 with the cooperation of WULFF and then QAD.

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**Representations by ST.PAUL regarding contacts with WULFF**

104. Although ST.PAUL had fiduciary-like duties towards its insureds, it failed to disclose the nature and details of ST.PAUL's and its attorneys' prior contacts and relationship with WULFF. ST.PAUL should have made such disclosure before it obtained Plaintiffs' consent which consent was the stated basis for the Court order(s) regarding mediation. Such non-disclosure is deliberate misrepresentation. In addition, ST.PAUL actively promoted WULFF as a proper neutral. ST.PAUL aggressively prevented the choice of alternative neutrals even when there was a scheduling problem with WULFF vis-à-vis the convenience of SUBRAMANIAN. Thus, the Court order of January 13, 2003 and all further orders regarding mediation were fraudulently obtained and the consent of Plaintiffs to such orders was obtained by such fraudulent representations and intentional non-disclosures.

**Representations by WULFF regarding neutrality**

105. WULFF represented to Vedatech Parties that he would not act as an advocate for any party. In addition, Mr Richards, the assistant to WULFF assured Vedatech Parties that a conflicts check had been made and there are no conflicts with respect to the actual parties to the mediation. This was and is a deliberate misrepresentation. Mr Richards at that time did not inform Plaintiffs about the more limited written "conflicts check" provision, which had loopholes for hiding the relationship that WULFF had with ST.PAUL. Mr. Richards is an agent of WULFF. WULFF is responsible for the fraudulent representations of Mr. Richards. WULFF further confirmed and added to Mr. Richards' misrepresentations on the day of the mediation and before the mediation started. Furthermore, WULFF did not provide Vedatech Parties with a reasonable opportunity to read or check the newly presented "conflicts check" documents, which was included in another document under duress.

106. Before the start of the Mediation, WULFF further assured SUBRAMANIAN that SUBRAMANIAN could terminate the mediation any time SUBRAMANIAN wanted to,

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1 and especially if and after SUBRAMANIAN initially made an effort to settle with QAD.  
2 WULFF had no intention of terminating the mediation if SUBRAMANIAN terminated it.  
3 Such assurances were false. ST.PAUL and WULFF needed the fig leaf of the participation  
4 by SUBRAMANIAN, just to lend an air of legitimacy for their premeditated plans for  
5 helping ST.PAUL benefit themselves (and QAD) at the expense of Vedatech Parties.

#### 6 **Intention to Induce Plaintiffs**

7  
8 107. WULFF and ST.PAUL intended Plaintiffs to rely upon these  
9 misrepresentations and fraudulent statements and deliberate non-disclosures and thus  
10 intended to and did induce them to attend the mediation under terms that were favorable to  
11 them and harmful to Plaintiffs. WULFF and ST.PAUL knew at all times that Plaintiffs  
12 would rely upon such statements. WULFF and ST.PAUL needed SUBRAMANIAN to join  
13 the mediation at least in the beginning as they could not otherwise engage in such  
14 negotiations with QAD under the cloak of secrecy provided by a "mediation".

#### 15 **Falsity and Knowledge of Falsity of these various representations**

16 108. All of the representations above were false and WULFF and ST.PAUL always  
17 knew that they were so false. From information and belief, WULFF has conducted various  
18 other mediations for ST.PAUL and/or Mr Greenan, the attorney for ST.PAUL and/or the firm  
19 that Mr Greenan works in. Notwithstanding potential conflicts because of such prior  
20 representation, such information was not disclosed to Plaintiffs by ST.PAUL or its attorneys  
21 or by WULFF. Had Plaintiffs been aware of such prior contacts, they would not have agreed  
22 to participating in this mediation at all or consented to the January 13, 2004 "order"

23 109. In addition, if Plaintiffs were aware of the falsity of such statements, even  
24 after the January 13, 2004 order or the further orders, they would have applied to the Court to  
25 set aside such Orders and would have sought relief from attending the mediation or  
26 withdrawn from it immediately.

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1                   **Reliance on these Misrepresentations**

2           110. Vedatech Parties were unaware of the falsity of these representations, were  
3 unaware of the information that was deliberately withheld from them, and relied upon these  
4 misrepresentations and, in the absence of proper disclosure, their reasonable beliefs as to the  
5 state of affairs, in "consenting" to the January 13, 2004 order, and not fully opposing further  
6 orders, participating even in the limited fashion in the mediation and in staying back briefly  
7 after initially telling WULFF before the mediation started that they wished to withdraw.

8                   **Proximate Harm and Damages**

9           111. As a proximate result of such reliance upon the false promises of these  
10 Defendants, Vedatech Parties have sustained heavy damages, and continue to sustain  
11 damages, including, but not limited to, further delay in pursuing legal remedies with respect  
12 to their claims, costs related to various satellite litigation necessitated by such fraud, potential  
13 compromise of their underlying claims, consequential damages caused by  
14 SUBRAMANIAN's inability to conduct other business and other incidental damages.

15           112. The actual damages are in an amount in excess of \$75,000, and to be  
16 determined at trial.

17                   **Exemplary and Punitive Damages**

18           113. The acts and conduct of these Defendants were, and continue to be oppressive,  
19 fraudulent, and malicious. Defendants knew or should have known, (and, in addition, know  
20 or should know) that their conduct would harm Vedatech Parties.

21           114. Defendants' actions were, and continue to be undertaken for the specific  
22 purpose of enriching themselves at the expense of Vedatech Parties. Vedatech Parties  
23 therefore seek, and are entitled to recover, punitive and exemplary damages in the amount to  
24 be determined at trial.

**(CONSPIRACY TO COMMIT FRAUD / MISREPRESENTATION)**

115. Plaintiffs reallege the allegations of paragraphs 1-114 above.

116. The various defendants, ST.PAUL, and WULFF acted in collusion with each other and other parties, and intended to commit and had the common purpose of committing the fraud alleged herein and profiting from the same at the expense of Vedatech Parties.

**Participation by QAD**

117. Defendant QAD became aware of the fraudulent schemes during the mediation, and initially through WULFF and/or ST.PAUL. Subsequently, willingly, and with an intent to harm Vedatech Parties, and with full knowledge of the details, purpose and intent of the parties thereof, QAD participated in the ongoing fraudulent scheme of ST.PAUL and WULFF. QAD especially relied upon the idea that the cloak of secrecy in mediation can be used to engage in fraudulent and collusive schemes to benefit themselves and ST.PAUL at the expense of Vedatech Parties.

118. Defendants are jointly and severally liable for the fraud and misrepresentation that either of them engaged in.

**Exemplary and Punitive Damages**

119. The acts and conduct of Defendants were, and continue to be oppressive, fraudulent, and malicious. Defendants knew or should have known, (and, in addition, know or should know) that their conduct would harm Vedatech Parties.

120. Defendants' actions were, and continue to be undertaken for the specific purpose of enriching themselves at the expense of Vedatech Parties. Vedatech Parties therefore seek, and are entitled to recover, punitive and exemplary damages in the amount to be determined at trial.

**FOURTH CAUSE OF ACTION  
(CONSTRUCTIVE FRAUD)**

121. Vedatech Parties reallege paragraphs 1-120 above.

**Duty of Care / Confidential Relationship / Fiduciary-like duties**

122. ST.PAUL in the position of an insurer had fiduciary-like duties towards its insureds. ST.PAUL further had a confidential relationship arising from the participation in a mediation. ST.PAUL breached their duties towards Vedatech Parties by their conduct described herein. ST.PAUL failed to disclose various material facts, and intended to conceal such material facts from Vedatech Parties, in an effort to harm Vedatech Parties and benefit themselves economically. Vedatech Parties relied to their own detriment upon the trust they placed in ST.PAUL (as the insurer).

123. Accordingly the facts alleged above constitute liability on the part of ST.PAUL and WULFF for constructive fraud.

124. WULFF in the position of a self-declared neutral and a mediator was in a confidential relationship with Vedatech Parties. WULFF further had a confidential relationship arising from the conduct of this particular mediation where he was supposed to help Vedatech Parties on the same footing as all of the other participants. WULFF breached his duties towards Vedatech Parties by his conduct described herein. WULFF failed to disclose various material facts, and intended to and did conceal such material facts from Vedatech Parties, in an effort to harm Vedatech Parties and benefit himself economically. Vedatech Parties relied to their own detriment upon the trust they placed in WULFF (as the mediator).

125. Accordingly the facts alleged above constitute liability individually and jointly on the part of WULFF for constructive fraud.



1 **Damages**

2 126. As a proximate result of such reliance upon the false promises and non-  
3 disclosures of Defendants, Vedatech Parties have sustained heavy damages, and continue to  
4 sustain damages, including, but not limited to, further delay in pursuing legal remedies with  
5 respect to their claims, costs related to various satellite litigation necessitated by such fraud,  
6 potential compromise of their underlying claims, consequential damages caused by  
7 SUBRAMANIAN's inability to conduct other business and other incidental damages.

8 127. The actual damages are in an amount in excess of \$75,000, and to be  
9 determined at trial.

10 **Exemplary and Punitive Damages**

11 128. The acts and conduct of Defendants were, and continue to be oppressive,  
12 fraudulent, and malicious. Defendants knew or should have known, (and, in addition, know  
13 or should know) that their conduct would harm Vedatech Parties.

14 129. Defendants' actions were, and continue to be undertaken for the specific  
15 purpose of enriching themselves at the expense of Vedatech Parties. Vedatech Parties  
16 therefore seek, and are entitled to recover, punitive and exemplary damages in the amount to  
17 be determined at trial.

18  
19 **(CONSPIRACY REGARDING CONSTRUCTIVE FRAUD)**

20 130. Plaintiffs reallege the allegations of paragraphs 1-129 above.

21 131. Defendants WULFF was aware of the purpose and intent of ST.PAUL in their  
22 plans to harm Vedatech Parties. WULFF acted in collusion with ST.PAUL in furtherance of  
23 the unlawful activities of ST.PAUL alleged herein. WULFF joined in the conspiracy in  
24 furtherance of his own individual economic interests (e.g. continuing business with  
25 ST.PAUL and their attorneys, Mr Greenan and his law firm).



132. WULFF is jointly and severally liable for the constructive fraud committed on Vedatech Parties by ST.PAUL.

133. Defendants ST.PAUL was aware of the purpose and intent of WULFF in his plans to harm Vedatech Parties. ST.PAUL acted in collusion with WULFF in furtherance of the unlawful activities of WULFF alleged herein. ST.PAUL joined in the conspiracy in furtherance of its own individual economic interests (e.g. unfairly gaining advantage in the coverage litigation, weakening Vedatech Parties' legal representation etc.).

134. ST.PAUL is jointly and severally liable for the constructive fraud committed on Vedatech Parties by WULFF.

135. Defendant QAD joined these conspiracies in furtherance of its own individual economic interests, and at the expense of Vedatech Parties. QAD intended to gain various benefits (e.g. a Settlement amount from ST.PAUL in return for dropping its worthless claims, avoidance of malicious prosecution claims from Vedatech Parties, weakening Vedatech Parties' legal representation – the last a multi-year ongoing effort by QAD, their in-house counsel Mr Roland Desilets, and their attorney Mr. Connell that is ongoing to this day.)

136. QAD intended to harm Vedatech parties and is liable as a co-conspirator for the acts and liabilities of ST.PAUL and/or WULFF.<sup>9</sup>

137. In addition, *to the extent* that ST.PAUL, and/or WULFF and/or QAD rely upon any agreement, formal or informal to participate in the mediation (as a forum for negotiating a settlement,) that agreement or those agreements (or the Court order itself) include(s) an implied covenant of good faith and fair dealing towards Vedatech Parties.

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<sup>9</sup> See e.g., *City of Atascadero v St. Paul Fire & Merrill Lynch.*, (1998) 68 Cal.App.4<sup>th</sup> 445, 464 and n.14 thereof (discussing civil conspiracy):

*As long as the third parties were acting to further their own individual economic interests, they may be liable for actively participating in a fiduciary's breach of his or her trust.*

138. The acts and conduct of Defendants were, and continue to be oppressive, fraudulent, and malicious. Defendants knew or should have known, (and, in addition, know or should know) that their conduct would harm Vedatech Parties. Plaintiffs' actions were, and continue to be undertaken for the specific purpose of enriching themselves at the expense of Vedatech Parties. Vedatech Parties therefore seek, and are entitled to recover, punitive and exemplary damages in the amount to be determined at trial.

139. Vedatech Parties reallege all of the allegations made in paragraphs 1-138 above.

140. In the alternative to the cause of action for intentional fraud, it is alleged in the alternative that Defendants ST.PAUL, WULFF, and DOES 1-50 made the various representations without any reasonable grounds for believing them to be true.

141. As a proximate result of such reliance upon the false promises of these Defendants, Vedatech Parties have sustained heavy damages, and continue to sustain damages, including, but not limited to, further delay in pursuing legal remedies with respect to their claims, costs related to various satellite litigation necessitated by such fraud, potential compromise of their underlying claims, consequential damages caused by SUBRAMANIAN's inability to conduct other business and other incidental damages.

142. The actual damages are in an amount in excess of \$75,000, and to be determined at trial.

**SIXTH CAUSE OF ACTION  
(INSURANCE "BAD FAITH")  
(BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING)**

143. Vedatech Parties reallege all of the allegations of paragraphs 1-142 above.

**The insurance agreements**

144. The contractual agreements between ST.PAUL and Vedatech Parties are detailed in the counterclaims (Fourth Amended Cross-Complaint) of the ST.PAUL-Case currently pending as C-04-01818.

**Bad Faith Acts by ST.PAUL**

145. Some of the bad faith actions of ST.PAUL are detailed in para.153 below under the section for "Unfair Competition". A sample is reproduced below:

- a. Contrary to their fiduciary-like duties, planning to breach such duties under the cloak of the mediation in order to "cut a deal" with QAD outside the sunshine of normal open settlement offers for insurance claims and responses;
- b. Mixing coverage concerns, nay, permitting coverage concerns to dominate and be the sole concern in dealing with settlement and mediation issues;
- c. Withholding reimbursement for defense costs already incurred based on past promises of ST.PAUL regarding their commitment at least regarding partial payments in limited areas, suddenly after the purported "settlement" with QAD;
- d. Permitting Mr. Greenan, Mr. Wang and their law firm to viciously attack Vedatech Parties (the insureds) in the coverage litigation and bringing meritless *ex parte* motion after *ex parte* motion in State Court with respect to the coverage litigation, mostly in violation of State Court procedural rules and thus compromising the preparation and work that insureds could put into defending

- 1 the QAD-Case; Harassing Plaintiffs with meritless "contempt of court" motions  
2 or inserting unwarranted "contempt of court" provisions in proposed orders etc.
- 3 e. Failure to present any settlement "offer" from QAD to Vedatech Parties (even if  
4 made under the excuse of "mediation") to see if Vedatech Parties were willing to  
5 continue defense without any help from ST.PAUL and see whether Vedatech  
6 Parties were willing to waive any excess liability for judgments that may exceed  
7 policy limits, especially when such a contingency (for excess Judgment) is non-  
8 existent;

9 **Continuing Bad Faith Acts**

10 146. Plaintiffs especially wish to emphasize the bad faith acts of ST.PAUL that  
11 have occurred since the answer in the original coverage action, viz. June 2002.

12 **Proximate Harm and Damages**

13 147. As a proximate result of such reliance upon the false promises of these  
14 Defendants, Vedatech Parties have sustained heavy damages, and continue to sustain  
15 damages, including, but not limited to, further delay in pursuing legal remedies with respect  
16 to their claims, costs related to various satellite litigation necessitated by such fraud, potential  
17 compromise of their underlying claims, consequential damages caused by  
18 SUBRAMANIAN's inability to conduct other business and other incidental damages.

19 148. The actual damages are in an amount in excess of \$75,000, and to be  
20 determined at trial.

21 **Exemplary and Punitive Damages**

22 149. The acts and conduct of these Defendants were, and continue to be oppressive,  
23 fraudulent, and malicious. Defendants knew or should have known, (and, in addition, know  
24 or should know) that their conduct would harm Vedatech Parties.  
25

150. Defendants' actions were, and continue to be undertaken for the specific purpose of enriching themselves at the expense of Vedatech Parties. Vedatech Parties therefore seek, and are entitled to recover, punitive and exemplary damages in the amount to be determined at trial.

**SEVENTH CAUSE OF ACTION  
(UNFAIR COMPETITION)**

**(CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200 et. seq.)**

151. Vedatech Parties reallege all of the allegations or paragraphs 1-150 above.

**Pattern of behavior**

152. From information and belief, Defendants have engaged in a pattern of behavior that is unlawful, unfair or fraudulent, including (in addition to all of the allegations in the Complaint set out above):

**ST.PAUL**

**Fraudulent Behavior**

- a. Fraudulently inducing Plaintiffs to "consent" to an order by the Court on January 13, 2004 (and inducing Plaintiffs not to oppose in full, subsequent orders) with respect to a mediation with premeditated plans for using the cloak of secrecy provided by mediation, so that they could, with the help of WULFF, and QAD, make collusive arrangements with QAD that would be harmful to their insureds;
- b. Fraudulently and coercively forcing Plaintiffs into such a mediation;
- c. Failure to disclose the detailed nature of ST.PAUL's (and their attorneys') prior relationship and dealings with WULFF to insureds, both before the January 13, 2004 hearing / order, and through the end of the mediation and afterwards;
- d. Other fraudulent behavior as detailed above;

**Abuse of Process**

- e. Inserting items such as “contempt of court” etc in Court orders even though the Court did not make such orders;
- f. Inserting various other provisions into proposed orders where the Court did not make such orders or made contrary orders;
- g. Harassing insureds by bringing improper “contempt of court” applications for trivial and disproportionate normal discovery issues and that too without notice and at ex parte hearings, with such documents being served literally seconds before the parties enter the chambers;

**Insurance Bad Faith and Conspiracy to Harm Plaintiffs**

- h. Compromising the defense of the QAD-Case by their vicious attacks on their own insureds;
- i. Failure to terminate the mediation when Vedatech Parties terminated it at or around 4:00 PM on March 12, 2004;
- j. Failure to separate coverage issues from settlement issues before and after the mediation;
- k. Failure to have a separation of duties and responsibilities between the coverage attorneys and the insurance adjuster so that the settlement discussions are not tainted with coverage concerns;
- l. Failure to inform or update insureds of secret negotiations undertaken with QAD and WULFF even after the mediation was terminated by SUBRAMANIAN;
- m. Failure to present any settlement “offer” from QAD to Vedatech Parties to see if they were willing to continue defense without any help from ST.PAUL and see whether Vedatech Parties were willing to waive any excess liability for judgments that may exceed policy limits;

- n. Continuing with the mediation between QAD and ST.PAUL even after mediation was terminated by SUBRAMANIAN;
- o. Conspiring with QAD and others to weaken Plaintiffs' legal representation with respect to the coverage litigation and concurrently getting released from their risk of bad faith behavior with respect to inadequate responses to their duties to defend;
- p. Asking WULFF to act as an advocate for ST.PAUL and QAD while sacrificing the interests of SUBRAMANIAN and VEDATECH;
- q. Withholding even the partial skimpy payments for past defense costs and fees already incurred (even for dates before March 15, 2004);
- r. Refusal to provide even this skimpy limited and partial reimbursement of defense costs for defense activities after the purported "settlement" of March 15, 2004;
- s. Making false statements in Court pleadings and letters to the Court in the insurance coverage litigation;
- t. Refusing to make any arrangements for advance payments in the QAD-Case and compromising the defense and discovery activities;
- u. Other fraudulent, unfair, and unlawful activities as detailed above;

#### **WULFF**

- v. Non-disclosure of relationship with ST.PAUL and their attorneys (including Mr Greenan and his law firm) to Vedatech Parties;
- w. Non-disclosure regarding past insurance related three-party mediation (such as between insurer, insured and plaintiffs in underlying litigation triggering insurance);
- x. Using Unfair and Unlawful activities during the mediation to favor one set of parties over the weaker, smaller party (the insured in this case);



- 1 y. Falsely presenting himself as a neutral while at the same time favoring large clients  
2 such as ST.PAUL and QAD to the detriment of small businesses and one-time clients;
- 3 z. Permitting the fact that ST.PAUL and QAD agreed to reimburse mediation fees affect  
4 neutrality;
- 5 aa. Adopting coercive tactics such as using ST.PAUL and QAD to obtain Court orders  
6 compelling Vedatech Parties to undertake various activities, all in relation to his own  
7 mediation while confessing that he himself had no such coercive authority;
- 8 bb. Misrepresenting the results of conflicts check and using small print for escape clauses  
9 buried in an addendum to the main form contracts. Using such hidden disclaimers to  
10 shift the burden of disclosure on voluntary acts of counsel;
- 11 cc. Misrepresenting the effect of the separate document of "conflicts check" as solely  
12 dealing with former clients of former law firm, while suppressing the vital  
13 information about non-disclosure of prior business relationship with other parties to  
14 the mediation and their attorneys;
- 15 dd. Using duress and coercive tactics to force Vedatech Parties to sign an agreement they  
16 did not want to sign;
- 17 ee. Continuing with the mediation after SUBRAMANIAN terminated it around 4:00 PM  
18 on March 12, 2004 in spite of knowing about the various conflicts and specifically in  
19 light of SUBRAMANIAN's pre-mediation query about the legality. Undertaking  
20 such activities in spite of opining to SUBRAMANIAN before the mediation started  
21 that this was an unsettled area of law. A mediator presenting himself as a neutral  
22 should not continue conflicting duties if there was even a hint of potential illegality;
- 23 ff. Unlawfully conspiring with ST.PAUL and QAD in the above activities;
- 24 gg. Other fraudulent and unlawful activities as detailed above;
- 25  
26  
27

1 **QAD**

- 2 hh. Unlawfully conspiring with ST.PAUL and WULFF in the above activities;
- 3 ii. Conspiring to unlawfully, fraudulently and unfairly benefiting to the tune of \$500,000
- 4 with such monies coming out of the insurance benefits of Vedatech Parties;
- 5 jj. Hiding the true nature of QAD Japan K.K. and QAD Japan Inc. in its SEC filings;
- 6 kk. Refusing to provide CGL policies covering relevant periods in spite of repeated
- 7 requests for the same, while at the same time engaging in secret collusive deals with
- 8 the insurer of Vedatech Parties;
- 9 ll. Refusing to provide timely information on insurance coverage for SUBRAMANIAN
- 10 under QAD Inc.'s policies;
- 11 mm. After the mediation, cooperating with ST.PAUL in furtherance of ST.PAUL's
- 12 insurance bad faith activities.

13

14 **ST.PAUL, WULFF and QAD**

- 15 nn. Other fraudulent, unfair and unlawful activities as detailed in the Complaint and to be
- 16 proven at trial;

17 153. Defendants' behavior, and pattern of behavior, including the unlawful, unfair

18 and fraudulent acts alleged above constitute a violation of the Unfair Competition Laws of

19 California, as set out in the California Business and Professions Code §§ 17200 et seq.

20

21 **(CONSPIRACY REGARDING UNFAIR COMPETITION)**

22 154. Plaintiffs reallege the allegations of paragraphs 1-155 above.

23 155. The various defendants acted in collusion with each other (as detailed above),

24 and with the common purpose of engaging in and with prior knowledge of the unfair,

25 unlawful and fraudulent business practices alleged herein and profiting from the same at the

1 expense of Vedatech Parties. Defendants are jointly and severally liable for their conduct  
2 and for the conduct of each other.

### 3 **RESTITUTION /DISGORGEMENT OF PROFITS**

4 156. ST.PAUL is enriched by withholding defense costs and benefits to Vedatech  
5 Parties. It is further enriched by its other bad faith activities described herein at the expense  
6 of Vedatech. ST.PAUL is liable to disgorge all such benefits that are due to the Vedatech  
7 Parties under the California Unfair Competition laws.

8 157. QAD is enriched by gaining the right to receive (or by actually receiving)  
9 \$500,000 from ST.PAUL from funds that are held in trust for the Vedatech Parties. QAD is  
10 also liable to Vedatech Parties for all of the amounts that ST.PAUL or WULFF are liable, on  
11 the basis of their participation in the conspiracies as alleged herein.

12 158. WULFF is liable to Vedatech Parties for all of the amounts that ST.PAUL or  
13 QAD are liable, on the basis of his participation in the conspiracies as alleged herein.

14 159. Defendants are also liable for any and all other remedies available to Vedatech  
15 Parties under the California Business and Professions Code §§ 17200 et seq.

16 160. The actual amounts in restitution /disgorgement of profits and other damages  
17 prayed for herein are in an amount in excess of \$75,000, and to be determined at trial.

---

### 19 **PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs respectfully pray for judgment against Defendants as follows:

- 21 (1) Declaratory and injunctive relief as sought herein or as deemed appropriate by the  
22 Court;  
23 (2) damages be awarded as sought herein;  
24 (3) for consequential and economic losses in an amount to be proven at trial;  
25 (4) restitution be provided for the unlawful profits made by Plaintiffs;  
26

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### 28 **First Amended Complaint of**

Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants  
St.Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff

- (5) for interest on such amounts;
- (6) for general damages to compensate Plaintiffs for their lost business opportunities, goodwill, and other losses in an amount to be proven at trial;
- (7) for punitive damages;
- (8) for attorney's fees and for costs of suit;
- (9) for equitable relief stripping defendants of their unjust enrichment;
- (10) for appropriate injunctions preventing defendants from continuing their unlawful, and/or unfair and/or fraudulent activities; *and*
- (11) for such and any other relief as the Court deems proper.

**Respectfully submitted** on behalf of Plaintiffs VEDATECH INC., VEDATECH K.K. and MANI SUBRAMANIAN.

Dated: June 15, 2004

**LAW OFFICES OF JAMES S. KNOFF**

By                     //s//                    

**CHRISTINA GONZAGA**  
ATTORNEY FOR PLAINTIFFS  
VEDATECH INC., *and*  
VEDATECH K.K.

Dated: June 15, 2004

**MANI SUBRAMANIAN (pro per)**

By                     //s//                    

**MANI SUBRAMANIAN (pro per)**

**Next Page: Demand for Jury Trial**

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**First Amended Complaint of**  
**Plaintiffs Vedatech Inc., Vedatech K.K. and Mani Subramanian against defendants**  
**St. Paul Fire and Marine Insurance, USF&G, QAD Inc., QAD Japan K.K. and Randall Wulff**

PLEASE TAKE NOTICE that Plaintiffs VEDATECH K.K. and MANI SUBRAMANIAN request a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

**LAW OFFICES OF JAMES S. KNOFF**

**MANI SUBRAMANIAN (pro per)**

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## C-04-01249 VRW

### AGREEMENT AND RELEASE

This Agreement and Release ("Agreement") is made between QAD INC., and QAD JAPAN K.K. (collectively "the QAD Parties") and ST. PAUL FIRE & MARINE INSURANCE COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY ("St. Paul"), as insurer for insured and putative insureds Vedatech Inc., Vedatech K.K., and Mani Subramanian (collectively "Insured and Putative Insureds").

#### Recitals

A. On January 26, 1998, QAD Inc. and QAD Japan K.K. filed suit against Vedatech Inc. and Mani Subramanian in the Santa Clara County Superior Court, Case Number 1-98-CV-771638 (the "First Action"), arising out of a dispute relating to events and circumstances arising from a commercial relationship between the parties dating to March 24, 1994. On July 29, 1998, Vedatech Inc. removed the First Action to the United States District Court for the Northern District of California (Case No. C98-20792-SW).

B. On September 17, 1999, Vedatech K.K. and Mani Subramanian filed suit in the Santa Clara County Superior Court, Case No. 1-99-CV-784685 (the "Second Action") against QAD Inc., among other defendants. On September 29, 1999, a First Amended Complaint was filed in the Second Action adding new causes of action and new defendants, including QAD Japan Inc., among others. On December 23, 1999, QAD Japan Inc. removed the Second Action to the United States District Court for the Northern District of California (Case No. C99-21241-SW).

C. On March 9, 2000, QAD Inc. and QAD Japan K.K. filed Counterclaims in the Second Action against Mani Subramanian and Vedatech K.K., also arising out of the dispute

## C-04-01249 VRW

relating to events and circumstances arising from the commercial relationship between the parties dating to March 24, 1994.

D. On April 10, 2000, the United States District Court for the Northern District of California remanded both the First Action and the Second Action to Santa Clara County Superior Court.

E. On September 1, 2000, QAD Inc. and QAD Japan K.K. filed a First Amended Cross-Complaint against Vedatech K.K. ("QAD Cross-Complaint") in the Second Action. Mani Subramanian, who had by now filed an Answer to the Complaint in the First Action, was dismissed as a cross-defendant in the QAD Cross-Complaint. Vedatech K.K. subsequently filed an Answer to the QAD Cross-Complaint.

F. The First Action and the Second Action were consolidated by the Santa Clara County Superior Court in early 2002 under the Lead Case Number 1-98-CV-771638.

G. On March 12, 2004, pursuant to an Order of the Court, the QAD Parties, St. Paul, and the Insured and Putative Insureds, among other parties in the First and Second Actions, participated in a mediation session before Randall Wulff, from which this Agreement arises.

H. On or about March 16, 2004, Mani Subramanian, Vedatech Inc., and Vedatech K.K. removed the consolidated First Action and Second Action to the United States District Court for the Northern District of California (Case No. C-04-01035-PJH).

I. St. Paul, as the insurer for Insured and Putative Insureds as to claims against them in the First and Second Actions, and the QAD Parties hereby wish to resolve all affirmative claims asserted by the QAD Parties against St. Paul's Insured and Putative Insureds in the First and Second Actions.



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### Agreement

In consideration of the foregoing and the following terms and conditions, it is hereby agreed:

1. The QAD Parties and St. Paul wish to effect a settlement and release of all claims asserted by the QAD Parties against Vedatech Inc. and Mani Subramanian in the First Action and a settlement and release of all claims asserted by the QAD Parties against Vedatech K.K. in the QAD Cross-Complaint filed in the Second Action. Accordingly, the QAD Parties shall take all steps necessary to effect a dismissal, with prejudice, of any and all claims asserted or that could be asserted against Vedatech Inc., Vedatech K.K. and Mani Subramanian, or any of them, in either the First Action or the Second Action, by way of complaint, counterclaim, or cross-complaint.

2. In exchange for the consideration set forth in Paragraphs 1, 3, 4, and 5 herein, St. Paul, on behalf of its Insured and Putative Insureds, agrees to pay to the QAD Parties, by check made payable to "QAD Inc.," the sum of Five Hundred Thousand Dollars Exactly (\$500,000). Said payment shall be made by St. Paul to QAD Inc. simultaneously with the entry of dismissal, with prejudice, by the Court in which the First Action and Second Action are then pending, of all claims of the QAD Parties against the Insured and Putative Insureds, including, specifically, the Complaint in the First Action and the First Amended Cross-Complaint in the Second Action.

3. The QAD Parties, on behalf of themselves and their principals, assigns, parents, subsidiaries, affiliated and related entities (including, but not limited to, QAD Japan Inc.), agents, officers, directors, and all persons, firms, associations and/or corporations connected with them (including, but not limited to, John Doordan and Lai Foon Lee), hereby agree to and do release and forever discharge Vedatech Inc., Vedatech K.K. and Mani Subramanian, and each of them,

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and any and all affiliated persons or entities including, but not limited to, heirs, executors, spouse and family estate, administrators, trustors, trustees, beneficiaries, predecessors, successors, assigns, partners, partnerships, parents, subsidiaries, affiliated and related entities, officers, directors, principals, agents, employees, servants, representatives, insurers, attorneys and all persons, firms, associations and/or corporations connected with them (collectively "Vedatech"), jointly or severally, from all claims, demands, actions, or causes of action that the QAD Parties have, have had, or may in the future have against Vedatech of any kind or nature, arising out of matters, events, or facts existing up to and including the date of this Agreement, including specifically, but not limited to, any claim, demand, action, or cause of action alleged in the Complaint in the First Action or the QAD Cross-Complaint in the Second Action. The QAD Parties further agree that they shall not seek to hold Vedatech responsible for any fees or costs the QAD Parties have incurred in prosecution of the First Action or the QAD Cross-Complaint. St. Paul agrees that it shall not seek to hold the QAD Parties responsible for any fees or costs Vedatech has incurred in prosecution of the First Action or the Second Action.

4. The QAD Parties recognize the possibility that presently unknown damages may exist or develop in the future with respect to the matters released pursuant to Paragraph 3 and that there is the possibility that the QAD Parties may have sustained damages as a result of the actions of the Insured and Putative Insureds, including but not limited to damages resulting from the matters described in Paragraphs A through I above, which are not yet known or anticipated. The QAD Parties desire, however, in contemplation of receiving the consideration set forth herein, to accept the risk that such damages may exist or develop and, accordingly, expressly release Vedatech from any and all such damages based upon facts that may become known to it in the future.

**C-04-01249 VRW**

5. The QAD Parties acknowledge and expressly agree to waive, in regard to all matters released by this Agreement, including any and all claims in the First Action and in the QAD Cross-Complaint in the Second Action, the provisions of California Civil Code, section 1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

6. The extent of the damages sustained by the QAD Parties hereto is unknown. The QAD Parties and St. Paul, respectively, rely wholly on their own judgment as to the extent of these damages and have not been influenced by any statement made by the other.

7. The QAD Parties and St. Paul, respectively, have carefully read this Agreement, know what is in it, and sign it freely and voluntarily.

8. This Agreement is intended not to impair the prosecution by Vedatech (as defined in Paragraph 3 above) of any and all affirmative claims that may exist with respect to the First or Second Action, or that may otherwise be available to Vedatech as against the QAD Parties, or either of them, and the prosecution of any and all such claims is in no manner impacted, affected, modified, cancelled, settled, released or waived by way of the release and discharge or any dismissal entered pursuant to this Agreement.

9. Nothing in this Agreement shall or may be construed as estoppel, waiver or admission by St. Paul of the existence of coverage under any insurance for any Vedatech entity or for Mani Subramanian with respect to the First Action or Second Action, and St. Paul reserves all rights with respect to its pending action, Santa Clara County Superior Court, Case No. 1-02-CV-805197. Furthermore, nothing in this Agreement is intended as, nor shall it be deemed to be or

**C-04-01249 VRW**

construed as, an admission by the QAD Parties, or either of them, of any liability with respect to any claims, demands, or causes of action alleged by Vedatech (as defined in Paragraph 3 above) in the First Action, the Second Action, or otherwise. The QAD Parties expressly deny any and all such liability. In addition, nothing in this Agreement is intended as, nor shall it be deemed to be or construed as, an admission by Vedatech (as defined in Paragraph 3 above) of any liability with respect to any claims, demands, or causes of action alleged by the QAD Parties, or either of them, in the First Action, the Second Action, or otherwise. St. Paul admits no liability on behalf of Vedatech through execution of this Agreement.

10. This Agreement shall be deemed to be made under and shall be construed in accordance with the laws of the State of California.

11. This Agreement contains the entire agreement between the parties hereto.

12. This Agreement constitutes an integration of the understanding and agreement of the parties. Any representation, warranty, promise or condition, whether written or oral, not specifically incorporated in this Agreement shall not be binding upon any of the parties, and all parties acknowledge that in entering into this Agreement they have not relied upon any representations, promises or conditions not specifically set forth in this Agreement.

13. This Agreement may be executed in counterpart, and each such counterpart shall be deemed an original.

IN WITNESS WHEREOF, the parties have executed this Agreement and Release as of the date set forth below.

Dated: March 24, 2004.

QAD Inc.

By: Karl Yepper

C-04-01249 VRW

Dated: March 25, 2004.

QAD Japan K.K.

By: Valerie Miller

Dated: \_\_\_\_\_, 2004.

St. Paul Fire & Marine Insurance Company  
and United States Fidelity and Guaranty  
Company

By: \_\_\_\_\_

C-04-01249 VRW

QAD Japan K.K.

Dated: \_\_\_\_\_, 2004.

By: \_\_\_\_\_

ସଂ ସଂ

Dated: 3/25, 2004.

St. Paul Fire & Marine Insurance Company  
and United States Fidelity and Guaranty  
Company

By: pe [signature]

C-04-01249 VRW  
GREENAN, PEFFER, SALLANDER & LALLY LLP

Two Annabel Lane, Suite 200  
Post Office Box 10  
San Ramon, California 94583-0010  
Telephone: (925) 866-1000 • Fax: (925) 830-8787

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Fax Cover Page

To: Jim Knopf  
Mani Sahramanian

Fax No. (888) 808-5001  
Phone No. (650) 627-9500

From: Enoch Wang

Date: 3-26-04

Client: St. Paul

Re: Signature Page

Number of pages to follow (excluding this page): 1

Comments:



03/09/2004 13:50 FAX 408 382 2293

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MDF 0224

UCS

1 FREDERICK S. FIELDS (# 36354)  
 2 SUSAN K. JAMISON (# 131867)  
 3 GAIL G. QUAN (#203705)  
 COBLENTZ, PATCH, DUFFY & BASS, LLP  
 One Ferry Building, Suite 200  
 San Francisco, California 94111  
 Telephone: (415) 391-4800  
 Facsimile: (415) 989-1663

5 Attorneys for Defendant  
 6 ARTHUR ANDERSEN LLP

**FILED**

MAR - 4 2004

KIRITCHRE  
 Deputy Clerk of the Superior Court of Santa Clara  
 BY [Signature] DEPUTY  
 ROWENA A. WALKER

## SUPERIOR COURT OF CALIFORNIA

## COUNTY OF SANTA CLARA

Case No. 1-98-CV-771638

11 QAD INC., a Delaware corporation, and  
 12 QAD JAPAN K.K., a Japanese corporation,

Plaintiffs,

vs.

15 MANI SUBRAMANIAN, an individual,  
 16 VEDATECH INCORPORATED, a  
 Washington corporation, and DOES 1  
 through 50, inclusive,

Defendants

18 VEDATECH K.K., a Japanese corporation;  
 19 MANI SUBRAMANIAN, an individual,

Plaintiffs,

vs.

22 QAD Inc., a Delaware corporation; QAD  
 23 JAPAN Inc., a Delaware corporation; et al.,

Defendants.

AND RELATED CROSS-COMPLAINT.

Case No. CV 784685

Date Action Filed: September 17, 1999

**STIPULATION AND ORDER  
REGARDING MEDIATION**

Date: March 13, 2004  
 Time: 9:30 a.m.

Case No. CV 784685

(Consolidated with Case No. CV 771638)

COBLENTZ, PATCH, DUFFY & BASS, LLP  
 ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4813  
 (415) 391-4800 • FAX (415) 989-1663

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STIPULATION AND ORDER REGARDING MEDIATION

03/09/2004 13:50 FAX 408 882 2293

SCCSC D17C

003/008

COBLENTZ, PATCH, DUFFY & BASS, LLP  
 ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4213  
 (415) 391-4800 • FAX (415) 392-1883

By and through their respective counsel, and by and through Mani Subramanian acting in proper, the parties, Mani Subramanian, Vedatech Inc. and Vedatech KK. (collectively, "Vedatech"), QAD, Inc., QAD Japan K.K., and QAD Japan, Inc. (collectively "QAD"), Lai Foon Lee, John Doordan, Arthur Andersen LLP ("Andersen"), and St. Paul Fire and Marine Insurance Company ("St. Paul") hereby stipulate and agree as follows, and stipulate and agree that the court may order them as follows:

(1) The parties' mediation will occur on March 12, 2004, at 9:30 a.m. at the location designated by the parties' mediator, Mr Randall Wulff.

(2) The following parties shall appear in person, either personally, in the case of the listed individual parties, or by an authorized representative, in the case of the listed entities:

- (e) Mani Subramanian
- (f) Vedatech
- (c) John Doordan
- (c) St. Paul

(3) The following parties shall be represented at the mediation by counsel, and shall be excused from appearing personally at the mediation, but shall provide a telephone number by which she or, in the case of the entities, their authorized representatives can be reached during the mediation. In the case of QAD, QAD shall make a senior executive with appropriate authority available by telephone and shall make all reasonable efforts to have Karl Lopker personally available by telephone as well.

The below-listed parties will, in use their best efforts to be accessible to the mediator and their counsel by telephone from 9:30 AM Pacific Standard Time until the conclusion of the mediation (which may not occur until after 5:00 p.m. Pacific Standard Time) or until released by the mediator:

- (a) QAD
- (f) Andersen
- (c) Lai Foon Lee

(4) Each party shall be prepared to sign an agreement with the mediator at the mediation, or, in the case of those parties who plan to participate by phone, shall execute and sign

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 ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4213  
 (415) 391-4000 • FAX (415) 989-1583

an agreement in advance of the mediation, such as the mediator may desire, which protects the mediator from personal liability, defines his role, and protects communications made to him from compelled disclosure, as is customary. (5) The parties shall abide by the usual, ordinary, and customary confidentiality rules governing mediations. Specifically, no aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding, including but not limited to:

- (a) Views expressed or suggestions made by a party with respect to a possible settlement of the dispute;
- (b) Admissions made in the course of the mediation proceedings; and
- (c) Proposals made or views expressed by the mediator or the response of any party.

This Order does not apply to any executed settlement agreement.

California Evidence Code sections 1115 through 1128 shall apply to this mediation and their provisions are incorporated by this reference in this Order, including specifically, but without limitation:

Section 1119:

(e) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given;

(f) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

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COBLENTZ, PATCH, DUFFY & BASS, LLP  
 ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4213  
 (415) 381-4800 • FAX (415) 989-1663

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Section 1127: If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in Section 250, and the court or other adjudicative body determines that the testimony or writing is inadmissible under this chapter, or protected from disclosure under this chapter, the court or adjudicative body making the determination shall award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing.

(6) Mediation briefs, with the exception of any "confidential/for mediator's eyes only" portion thereof, will be provided to the mediator and exchanged no later than March 8, 2004.

(7) The mediator's fee shall be paid in equal parts by St. Paul and QAD. If extraordinary fees result from unanticipated events requiring the mediator's attention, any party may approach the court and request that a different allocation be ordered.

(8) The mediator shall enjoy the discretion to modify any term hereof upon stipulation of the parties without further intervention from the court. The mediator may, in addition, direct a party to use its best efforts to have an additional representative available by telephone if he deems such a direction necessary for the success of the mediation, without stipulation of the parties and without further order from this court. The parties shall use their best efforts to comply with any such direction.

(9) This Order shall constitute the basis for the mediation and shall supersede any prior conflicting orders relating to the mediation.

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COBLENTZ, PATCH, DUFFY & BASS, LLP  
ONE FERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4213  
(415) 391-4900 • FAX (415) 968-1683

1 SO STIPULATED.

2  
3  
4 Dated: February \_\_, 2004

GCA LAW PARTNERS

5  
6 William Connell  
Attorneys for QAD Inc., QAD Japan K.K., QAD Japan  
Inc., Lai Foon Lee, and John Doordan

7  
8 Dated: March 4, 2004

COBLENTZ, PATCH, DUFFY & BASS, LLP

9  
10 Frederick S. Fields  
Attorneys for Andersen

11  
12  
13 Dated: February \_\_, 2004

LAW OFFICES OF JAMES S. KNOPF

14  
15 James S. Knopf  
Attorneys for Vedatech Inc. and Vedatech K.K.

16  
17  
18 Dated: February \_\_, 2004

MANI SUBRAMANIAN

19 Mani Subramanian (pro per)

20  
21 Dated: March 4, 2004

GREENAN, PEPPER, SALANDER & LALLY LLP

22  
23 James Greenan  
Attorneys for St. Paul

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STIPULATION AND ORDER REGARDING MEDIATION

03/09/2004 13:51 FAX 408 882 2293

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COBLENTZ, PATCH, DUFFY & BASS, LLP  
ONE PERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4213  
(415) 361-4800 • FAX (415) 988-1863

1 SO STIPULATED.

2  
3  
4 Dated: February 27, 2004

GCA LAW PARTNERS

  
William Connell  
Attorneys for QAD Inc., QAD Japan K.K., QAD Japan  
Inc., Lai Foon Lee, and John Doordan

5  
6  
7  
8  
9 Dated: February \_\_, 2004

COBLENTZ, PATCH, DUFFY & BASS, LLP

10  
11 Frederick S. Fields  
Attorneys for Andersen

12  
13  
14 Dated: February \_\_, 2004

LAW OFFICES OF JAMES S. KNOPF

15  
16 James S. Knopf  
Attorneys for Vedatech Inc., and Vedatech K.K.

17  
18 Dated: February \_\_, 2004

MANI SUBRAMANIAN

19  
20 Mani Subramanian (*pro per*)

21 Dated: February \_\_, 2004

GREENAN, PEPPER, SALLANDER & LALLY LLP

22  
23  
24 James Greenan  
Attorneys for St. Paul

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STIPULATION AND ORDER REGARDING MEDIATION

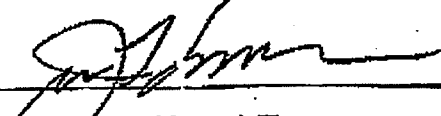
03/09/2004 13:51 FAX 408 882 2293

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008/008

~~UPON STIPULATION OF THE PARTIES, IT IS SO ORDERED.~~

*March 4, 2004*  
Dated: February, 200

  
The Honorable Jack Komar  
JUDGE OF THE SUPERIOR COURT

COBLENTZ, PATCH, DUFFY & BASS, LLP  
ONE PERRY BUILDING, SUITE 200, SAN FRANCISCO, CA 94111-4213  
(415) 391-4800 • FAX (415) 988-1883

03696.004.0230.5



Cathy A. Catterson  
Clerk of Court

Office of the Clerk  
**United States Court of Appeals for the Ninth Circuit**  
95 Seventh Street  
Post Office Box 193939  
San Francisco, California 94119-3939



(415) 355-8000

December 11, 2007

USDC, San Francisco  
Northern District of California (San Francisco)  
Federal Building  
P.O. Box 36060  
San Francisco, CA 94102

No.	Title	Agency/D.C. No.
05-16255	St. Paul Fire & M. v. Vedatech Int'l	CV-04-01403-VRW
05-16261	St. Paul Fire & M. v. Vedatech Int'l	CV-04-01818-VRW
05-16405	Vedatech, Inc. v. St. Paul Fire & Mari	CV-04-01249-VRW

Dear Clerk:


The following document in the above listed causes are being sent to you under cover of this letter.

- *Certified copy of the Decree of the Court*

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson  
Clerk of Court

  
By: Gerald Rosen  
Deputy Clerk

Enclosure(s)  
cc: All Counsel



UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY; et al.,

Plaintiffs - Appellees,

v.

VEDATECH INTERNATIONAL INC.; et  
al.,

Defendants - Appellants.

No. 05-16255

D.C. No. CV-04-01403-VRW

**JUDGMENT**

ST. PAUL FIRE & MARINE  
INSURANCE COMPANY; et al.,

Plaintiffs - Appellees,

v.

VEDATECH INTERNATIONAL INC.; et  
al.,

Defendants - Appellants.

No. 05-16261

D.C. No. CV-04-01818-VRW

**JUDGMENT**

VEDATECH, INC., a Washington State  
Corporation; et al.,

Plaintiffs - Appellants,

v.

ST. PAUL FIRE & MARINE

No. 05-16405

D.C. No. CV-04-01249-VRW

**JUDGMENT**

INSURANCE; et al.,

Defendants - Appellees.

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 07/19/07